No. 80-12

In the Supreme Court of the United States

OCTOBER TERM, 1979

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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NATIONAL SEA CLAMMERS ASSOCIATION, ET AL.[1]

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QUESTION PRESENTED

Whether the Clean Water Act, 33 U.S.C. (and Supp. I) 1251 *et seq.*, and the Marine Protection, Research, and

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[1] Other petitioners are Russell E. Train, individually and as Administrator of the United States Environmental Protection Agency, United States Army Corps of Engineers, and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army. Douglas M. Costle is now the Administrator of EPA and Clifford L. Alexander is now the Secretary of the Army.

Other respondents are Gosta Lovgren, City of New York, Honorable Abraham Beame, New York Department of Environmental Conservation, Ogden R. Reid, individually and as Commissioner of the New York Department of Environmental Conservation, New Jersey Department of Environmental Protection, David J. Bardin, individually and as Commissioner of New Jersey Department of Environmental Protection, Bergen County Sewer Authority, the Joint Meeting of Essex and Union Counties, Passaic Valley Sewerage Commissioners,

Sanctuaries Act of 1972, 33 U.S.C. (and Supp. I) 1401 *et seq.*, imply a private right of action independent of the rights explicitly created by the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g).

Middlesex County Sewerage Authority, the Linden Roselle Sewerage Authority, Middletown Sewerage Authority, West Long Beach Sewer District, County of Westchester, Department of Environmental Facilities, City of Long Beach and City of Glen Cove.

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The Solicitor General, on behalf of the Environmental Protection Agency, the United States Army Corps of Engineers, Russell E. Train and Martin R. Hoffman, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-31a) is reported at 616 F.2d 1222. The opinion of the district court (App. C, *infra*, 35a-59a) is unofficially reported at 12 E.R.C. 1118.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 32a-34a) was entered on February 5, 1980. On April 24, 1980, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including July 4, 1980 (App. E, *infra*, 62a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 505 of the Federal Water Pollution Control Act, 33 U.S.C. 1365, provides in pertinent part:

Citizen suits.

(a) Authorization; jurisdiction.

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319 (d) of this title.

(b) Notice.

No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii) to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or

criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317 (a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) Venue; intervention by Administrator.

(1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

(d) Litigation costs.

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Statutory or common law rights not restricted.

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

(f) Effluent standard or limitation.

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title, (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) a permit or condition thereof issued under section 1342 of this title, which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

(g) Citizen.

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

Section 105(g) of the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. 1415(g), provides:

Civil suits by private persons.

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the

eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, limitation, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of this subchapter.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Adminis-

trator or Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Administrator, the Secretary, or a State agency).

STATEMENT

Respondent National Sea Clammers Association is an association whose members earn their living harvesting fish and shellfish i the Atlantic Ocean off the coast of New York and New Jersey. Respondent Gosta Lovgren is an individual member of the association. On January 14, 1977, these two respondents brought suit, on behalf of themselves and all others similarly situated, against petitioners and the other respondents in the United States District Court for the District of New Jersey.

The complaint alleges that the City of New York, other municipalities in the area, and the United States Army Corps of Engineers discharge dredge spoil, sewage and other toxic materials into the Atlantic Ocean and its tributaries. Some of these discharges are alleged to be authorized by permits issued by petitioners in the course of the administration of various federal water pollution control statutes. The complaint further alleges that these dis-

charges caused a massive growth of algae in 1976 in an area extending up to twenty miles offshore from Long Island to Cape May, New Jersey. When this algae mass bloomed and died it allegedly settled on the ocean floor, and its decomposition allegedly created an oxygen deficiency that caused severe damage to marine life in the area. The complaint charges that the discharges "have caused and continue to cause massive destruction of marine plant life, fish, clams, lobsters and other marine life unable to escape and thereby, has caused and continues to cause the collapse of the fishing, clamming and lobster industries which operate in the waters of the Atlantic Ocean." Complaint ¶ 39.

The complaint alleges violations of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1251 *et seq.*, the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA), 33 U.S.C. 1401 *et seq.*, Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, the federal common law of nuisance, the Fifth, Ninth and Fourteenth Amendments to the Constitution and New York and New Jersey state statutes. The jurisdiction of the district court is invoked under 28 U.S.C. 1331(a), 1332, 1337, 1343 and 1361, 42 U.S.C. 1983, the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b) and 28 U.S.C. 2671 *et seq.*, the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, the Extension of Admiralty and Maritime Jurisdiction Act, 46 U.S.C. 740, and under 28 U.S.C. 1333(1). The relief sought includes the imposition of fines and penalties against the dischargers to be paid in part to the plaintiffs, a declaration that petitioners have failed to comply with the requirements of the FWPCA, MPRSA and NEPA, mandamus to compel petitioners to revoke all permits allowing discharges into the Atlantic

Ocean and an injunction against the dischargers to prevent further dumping. In addition, the complaint seeks $250 million in actual damages and $250 million in punitive damages to be "assessed against defendants jointly and severally." Complaint ¶¶ 94–109.

2. Petitioners and most of the other defendants moved to dismiss the claims under Fed. R. Civ. P. 12(b). The district court treated the motion as a motion for summary judgment and ordered the complaint dismissed with prejudice, except that some of the state law claims were dismissed without prejudice (App. D, *infra*, 60a–61a).

The court dismissed the claims under the FWPCA and the MPRSA because the plaintiffs did not comply with the procedural requirements of the citizen suit provisions of those Acts, 33 U.S.C. 1365 and 33 U.S.C. 1415(g), in particular the requirement that 60 days' notice be given to EPA and to the alleged violator prior to the commencement of suit. The court also rejected the argument that an implied right of action exists under those statutes, but not subject to the specific requirements of the citizen suit provisions and for which jurisdiction may be invoked under 28 U.S.C. 1331 (App. C, *infra*, 43a–50a).

As to the other claims, the court held that the federal common law of nuisance claim should be dismissed because private parties have no standing to bring such a claim (App. C, *infra*, 40a–41a); that no private right of action exists under Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 (*id.* at 41a–42a); and that the complaint did not state a claim of a violation of a constitutional right or any property interest cognizable under the Fifth Amendment (*id.* at 51a–53a). It also ruled that EPA could not be liable for violation of NEPA because of the specific exemption contained in 33 U.S.C. 1371(c) (*id.* at 50a–51a) and that no cause of action for maritime tort was pre-

sented (*id.* at 53a). Finally, the court held that the plaintiffs had not complied with the requirements for suit under the FTCA or the relevant state tort claim statutes (*id.* at 53a–57a).

3. The court of appeals reversed in part, reinstating the claims under the FWPCA and the MPRSA, the federal common law of nuisance and in maritime tort. The court vacated the dismissal of the NEPA claim for reconsideration in light of further development of the record, and the court affirmed the dismissal of the other claims. The court ruled that private parties could maintain an action under the federal common law of nuisance (App. A, *infra*, 20a–24a). It also held that the plaintiffs had made out a cause of action in maritime tort, but agreed with the district court that this cause of action could not be pursued against petitioners because of the failure to comply with the FTCA (*id.* at 24a–28a).

With respect to the claim under the FWPCA, the court of appeals agreed that the plaintiffs had not met the requirements of the citizen suit provision of that statute. The court, however, held that they had an alternate basis for suit under Section 505(e) of the FWPCA, 33 U.S.C. 1365(e), invoking jurisdiction under 28 U.S.C. 1331. Section 505(e) is a "savings clause," reciting that the citizen suit provision does not "restrict any right * * * under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief." Applying the analysis of *Cort* v. *Ash*, 422 U.S. 66 (1975), the court of appeals found that a private right of action should be implied under the FWPCA on behalf of individuals injured by pollution in violation of those statutes (App. A, *infra*, 11a–16a). This implied right of action, the court concluded, was "preserved" by the savings clause and there-

fore the plaintiffs could maintain their claims alleging violations of the FWPCA without reference to the restrictions imposed by the citizen suit provision.

The court of appeals then examined the similar citizen suit provision of the MPRSA and ruled that it was indistinguishable from that of the FWPCA for these purposes. Accordingly, it held that the savings clause of the MPRSA, 33 U.S.C. 1415(g) (5), also preserved an implied private right of action under that statute separate from the citizen suits authorized by 33 U.S.C. 1415(g) (App. A, *infra*, 16a–18a).

REASONS FOR GRANTING THE PETITION

1. The decision of the court of appeals directly conflicts with the decision of the Seventh Circuit in *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1012–1016 (1979). In *Evansville*, the plaintiffs brought suit to recover damages allegedly caused by the discharge of toxic materials into the Ohio River by the defendants. As in this case, the plaintiffs did not comply with the 60-day notice requirement of 33 U.S.C. 1365(b) and, moreover, their suit was for damages. Accordingly, they could not sue under the citizen suit provision of the FWPCA. The court rejected the plaintiffs' contention that they could maintain their suit under the theory of an implied right of action under the FWPCA. Applying the analysis of *Cort* v. *Ash*, *supra*, the court concluded that Congress did not intend to create an additional private right of action under the FWPCA apart from the action established in the citizen suit provision. 604 F.2d at 1014–1016. See also *City of Highland Park* v. *Train*, 519 F.2d 681, 693 (7th Cir. 1975), cert. denied, 424 U.S. 927 (1976)

(Clean Air Act).[2] The court below recognized that its holding was inconsistent with the Seventh Circuit's position, but explicitly declined to follow that court (App. A, *infra*, 9a–10a n.12).[3]

The decision of the court of appeals in this case is incorrect. The citizen suit provisions of the FWPCA and the MPRSA demonstrate a congressional intent to limit carefully the public role in enforcement of the statutes. *City of Evansville* v. *Kentucky Liquid Recycling, Inc.*, *supra*, 604 F.2d at 1015; S. Rep. No. 92-414, 92d Cong., 1st Sess. 79 (1971). It strains credulity to imagine that Congress expressly established a private right of action, subject to important restrictions, while creating by implication a second right of action free from those restrictions. "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, No. 77-1645 (Nov. 13, 1979), slip op. 8.

Nor does a common sense reading of the savings clause, on which the court of appeals relied, support the implication of a private right of action. It is true that the clause

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[2] In this case, the court of appeals has found an implied private right of action not only against another private party alleged to be a polluter, but also against a federal regulatory agency. The action reinstated against petitioners, however, is only for injunctive relief because of the plaintiffs' failure to comply with the FTCA (App. A, *infra*, 16a, 28a). Moreover, although the court of appeals does not specifically discuss the question, it seems apparent that sovereign immunity would also preclude the imposition of damages against the government under the implied right of action. See *Commonwealth of Massachusetts* v. *United States Veterans Administration*, 541 F.2d 119 (1st Cir. 1976).

[3] The court relied instead upon *Natural Resources Defense Council, Inc.* v. *Callaway*, 524 F.2d 79, 83–84 (2d Cir. 1975), and *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 699–700 (D.C. Cir. 1974). Those decisions held that compliance with the procedural requirements of the citizen suit provision of the FWPCA was not a prerequisite to a suit invoking jurisdiction under 28 U.S.C. 1331 but did not consider whether a private right of action could be implied under the FWPCA.

preserves other causes of action "under *any* statute," but such clauses ordinarily are not aimed at "saving" rights created by the very statute in which they are contained—certainly not implicit rights. Indeed, the legislative history, in discussing the savings clause, refers to rights "under any *other* law." S. Rep. No. 92-414, *supra*, at 81 (FWPCA); S. Rep. No. 92-451, 92d Cong., 1st Sess. 23-24 (1971) (MPRSA) (emphasis added). Accordingly, the answer to "[t]he central inquiry * * * whether Congress intended to create * * * a private cause of action" (*Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 575 (1979)), in addition to the cause of action expressly created, plainly seems to be that it did not.

Where it is clear that Congress did not intend to create the private remedy sought to be implied, no further inquiry is necessary. *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 576. In any event, an analysis of the four factors set out in *Cort* v. *Ash*, *supra*, supports the conclusion that the court of appeals' decision is erroneous. First, the court's conclusion (App. A, *infra*, 13a) that the plaintiffs here are members of a class for whose especial benefit the statute was enacted is mistaken. To be sure, the plaintiffs may derive a greater benefit from the purification of the waters of the United States than some other members of the general public, but federal anti-pollution statutes, such as the FWPCA and MPRSA, are statutes enacted to protect the general public, rather than a special class. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 690 (1979). Second, as discussed above, the legislative history and the citizen suit provision itself indicate that Congress did not intend to imply a private right of action. Third, implying a private right of action would seriously interfere with the congressional intent to limit the public role in enforcement within the confines of the citizen suit provisions so as to "encourage and provide for agency en-

forcement." S. Rep. No. 92-414, *supra*, at 79. As to the fourth *Cort* factor, although an action seeking relief from pollution is one that has been traditionally dealt with by state law, we concede that a federal remedy is not inappropriate. See *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). This factor, therefore, is equivocal; it certainly does not outweigh the legislative intent and the force of the other considerations.

The conflict in the circuits is ripe for resolution in this case. The trial for which this case has been remanded is likely to be complex and protracted. The erroneous decision of the court of appeals prevents petitioners from being dismissed as defendants. Although the court of appeals also reinstated, in addition to the statutory claims, the plaintiffs' maritime tort claim and federal common law of nuisance claim, relief against petitioners is not available under those claims. The court of appeals held that failure to comply with the FTCA precludes recovery against petitioners under the maritime tort claim (App. A, *infra*, 28a). As to the federal common law of nuisance, the court of appeals decided only that private parties could bring such an action. Apart from the serious question of sovereign immunity, which precludes the recovery of damages against petitioners (see *ibid.*), it is apparent that no common law remedy lies against petitioners for their regulatory activity. A common law nuisance action lies against a tortfeasor, in this case the discharger. But there is surely no common law nuisance created by a regulation or a permit issued by a federal agency in the course of exercising its duty of administering a regulatory program authorized by Congress.[4]

[4] Because it held that private parties could not bring such an action, the district court had no occasion to decide which defendants could conceivably be liable under a theory of federal common law nuisance. This determination would be made on remand, but in advance of trial.

2. The decision of the court of appeals significantly undermines the enforcement scheme established by Congress under the FWPCA and MPRSA. Congress expressly provided a role for citizen enforcement in the scheme. But the citizen suit provisions of these statutes, which are modeled on those in the Clean Air Act, 42 U.S.C. (Supp. I) 7604, were carefully crafted to limit the type of private actions that may be brought for alleged violations of the statute and the form of relief available. See generally S. Rep No. 92-414, *supra*, at 79-82. Under the FWPCA, suit may be brought against a discharger for violating an effluent standard or against the Administrator of EPA for failure to perform a nondiscretionary duty. The court may order the Administrator to perform his duty, enforce the effluent standard and impose civil penalties against the violator. 33 U.S.C. 1365. Under the MPRSA, suit may be brought by private citizens to enjoin violations of standards established under the statute. 33 U.S.C. 1415(g)(1).

Even as to this limited class of actions, there are also important procedural limitations. No action may be commenced until 60 days' notice has been given to the Administrator of EPA and the alleged violator. 33 U.S.C. 1365(b), 1415(g)(2)(A). But no suit may be instituted if the United States is diligently pursuing an action against the alleged violator for the conduct at issue. 33 U.S.C. 1365(b)(1)(B), 1415(g)(2). The citizen suit provisions also specify that suit shall be brought in the judicial district in which the pollution source is located or violation occurs. 33 U.S.C. 1365(c)(1), 1415(g)(3)(A). Finally, the government is empowered to intervene as a matter of right in any suit initiated under these provisions. 33 U.S.C. 1365(c) (2), 1415(g)(3)(B). The purpose and effect of these procedural provisions is to place the primary responsibility for enforcement of these statutes upon the government and to enable EPA to exercise some control over enforcement

proceedings. The government is given the opportunity to institute administrative action or its own court action against a violator before the notice period expires, thus obviating the need for private litigation. See *City of Highland Park* v. *Train, supra,* 519 F.2d at 691; S. Rep. No. 1196, 91st Cong., 2d Sess. 36–39 (1970); Steinberg, *Is the Citizen Suit a Substitute for the Class Action in Environmental Litigation? An Examination of the Clean Air Act of 1970 Citizen Suit Provision,* 12 San Diego L. Rev. 107, 132 (1974). Thus, one goal of Congress was to "encourage and provide for agency enforcement." S. Rep. No. 92–414, 92d Cong., 1st Sess. 79 (1971).

This focus on agency enforcement is undermined by the decision of the court of appeals. If a litigant is free to bring suit without the constraints of the citizen suit provisions, controversies that might otherwise be resolved through administrative action during the 60-day notice period will result in litigation. Under the court of appeals' decision, even when EPA is diligently pursuing a court action against an alleged violator, a private litigant will be free to bring a second action, which may be in a different court because it is not subject to the venue requirements of the statutory provisions.[5] The decision below opens the way for litigants to bypass the carefully constructed requirements of the citizen suit provisions and essentially makes those provisions meaningless. Cf. *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692, 702 (D.C. Cir.

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[5] The increased possibility of inconsistent verdicts inherent in this approach is demonstrated in this case. The government has brought an enforcement action against respondent Westchester County in the United States District Court for the Southern District of New York regarding the same discharges involved in this case and that court has entered an order establishing a schedule for compliance by the County. *United States* v. *County of Westchester,* Civ. No. 79–2186. If the relief requested here is granted, the County will be enjoined from any dumping, effectively overruling the district court's order.

1974).[6] Moreover, the decision opens the way for private suits against the government itself beyond those authorized by Congress.

Although technically restricted to the FWPCA and the MPRSA, the decision of the court of appeals implicates other statutes as well. The citizen suit provisions involved are similar to provisions contained in the Noise Control Act of 1972, 42 U.S.C. 4911, the Resource Conservation and Recovery Act of 1976, 42 U.S.C. (& Supp. II) 6972, the Endangered Species Act of 1973, 16 U.S.C. 1540(g), the Safe Drinking Water Act, 42 U.S.C. (& Supp. I) 300j-8, the Toxic Substances Control Act, 15 U.S.C. 2619-2620, the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. (Supp. I) 1270, and the Deepwater Port Act of 1974, 33 U.S.C. 1515, all of which are modeled on the provisions of the Clean Air Act, 42 U.S.C. (Supp. I) 7604. Thus, the enforcement schemes established by Congress under these statutes may also be disrupted by the court of appeals' decision.

The importance of the question presented in this case, its wide-ranging effect, and a direct conflict in the circuits, all argue in favor of review of the decision of the court of appeals.

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[6] The plaintiffs, of course, can challenge the issuance of permits under other review provisions, such as 33 U.S.C. 1369(b)(1) under the FWPCA, without resorting to the citizen suit provisions. However, such review is in accord with the statutory scheme of reviewing final agency action and requires exhaustion of administrative remedies. It does not undermine the congressional scheme for vesting primary responsibility and control of enforcement with the agency, as does the decision of the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JULY 1980

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 79-1360

NATIONAL SEA CLAMMERS ASSOCIATION AND GOSTA LOVGREN, *Appellants*

v.

CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMAN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BERGEN COUNTY SEWER AUTHORITY, THE JOINT MEETING OF ESSEX AND UNION COUNTIES, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLESEX COUNTY SEWERAGE AUTHORITY, THE LINDEN ROSELLE SEWERAGE AUTHORITY, MIDDLETOWN SEWERAGE AUTHORITY,

WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE

(D.C. Civil No. 77-01260)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 16, 1979

BEFORE: GIBBONS AND HIGGINBOTHAM, *Circuit Judges*, and WEINER,* *District Judge*

(Opinion Filed February 5, 1980)

OPINION OF THE COURT

GIBBONS, *Circuit Judge.*

This case comes before us on an appeal by plaintiffs National Sea Clammers Association and Gosta Lovgren from a final order dismissing their complaint. Plaintiffs are an association whose members make their living harvesting fish and shellfish from the water and ocean beds of the Atlantic Ocean near New York and New Jersey, and an individual similarly employed. They sue on behalf of themselves and a class comprising all others similarly situated. Defendants are various federal, state, and local officials and governmental departments that are charged with en-

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*Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

vironmental protection or that are responsible for sewage treatment and disposal.

Plaintiffs' complaint alleged that defendants discharged or permitted the discharge of certain nutrient-rich sewage and toxic wastes into the Atlantic Ocean or its tributaries. It further alleged that in 1976 these discharges caused a massive and rapid growth of algae from Long Island to Cape May and extending from a few miles to twenty miles offshore. When this algal mass bloomed and died it allegedly settled on the ocean's floor, and its subsequent decomposition created an anoxia, an oxygen deficiency, in the water near the ocean's floor, which caused death and other adverse effects on marine life, particularly on those life forms, such as shellfish; ill able to flee the afflicted area. Plaintiffs alleged violations of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4361 (1976), the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376 (1976 & Supp. I), the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401–1444 (1976), the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1976), the New York Environmental Conservation Law, N.Y. Environ. Conserv. § 1–0101 (McKinney 1973), the New Jersey Conservation and Development Law, N.J.S.A. 13:10–1 (1968), the federal common law of nuisance, and the fifth, ninth, and fourteenth amendments to the Constitution. Defendants moved for dismissal of all claims on the grounds that the court lacked subject matter jurisdiction, *see* Fed. R. Civ. P. 12(b)(1), or that the plaintiffs had failed to state a claim on which relief could be granted, *see* Fed. R. Civ. P. 12(b)(6). The complaint seeks injunctive relief, damages, mandamus to compel compliance with statutory duties, the imposition of fines and penalties for certain violations, the award to plaintiffs of one half of the fines assessed, and attorneys' fees. The trial court, holding that the submis-

sion of affidavits converted the motions into motions for summary judgment, granted defendants' motions as to each cause of action alleged. The complaint was dismissed, with prejudice, on all claims except for two said to arise under state law which were dismissed without prejudice. This appeal followed. We discuss separately the various legal theories which were pleaded and rejected.

I. *The Federal Water Pollution Control Act*

The district court held that plaintiffs' failure to comply with the notice requirements of the Federal Water Pollution Control Act (FWPCAA)[1] deprived it of jurisdiction to entertain plaintiffs' claim that defendants violated their duties under that Act. Section 505(a) of the FWPCAA grants to any private citizen the right to sue to enforce compliance with effluent standards or limitations, 33 U.S.C. § 1365(a)(1), or to compel the Administrator of the Environmental Protection Agency to perform nondiscretionary duties. *Id.* § 1365(a)(2). Section 505(b) requires that in suits brought pursuant to subsection (a), 60 days' notice be given to specified parties to the suit. *Id.* § 1365(b).[2] Regulations promulgated by the Administrator define the type and specificity of the notice required. 40 C.F.R. § 135.3(A)(1979).

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[1] The Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1376 (1976 & Supp. I) was patterned after the Clean Air Act, 42 U.S.C. §§ 7401–7642 (1976). As originally enacted it was seriously deficient as a comprehensive regulatory scheme and was substantially amended in 1972. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, *reprinted in* [1972] U.S. Code Cong. & Ad. News 951, *codified in* 33 U.S.C. §§ 1251–1376 (1976); *see* W. Rodgers, Environmental Law § 4.2 (1977). The 1972 amendments created the private right of action here in issue. Although the Act was further amended in 1977, those changes are not relevant to this litigation.

[2] Numerous environmental protection statutes contain citizens' suit provisions, each of which also contains a notice requirement similar to

The district court held that the notice provision of section 505(b) was a jurisdictional prerequisite to suit, such that plaintiffs' failure to give notice barred suit under section 505(a). 33 U.S.C. § 1365(a). This court has rejected the theory that substantial compliance with the notice requirement suffices to give the court jurisdiction under section 505(a). We require instead strict adherence to the Act's notice provisions for suits brought pursuant to section 505(a). *Loveladies Property Owners Ass'n. v. Raab*, 430 F. Supp. 276, 280–81 (D.N.J. 1975), *aff'd mem.*, 457 F.2d 1162 (3d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977). We do not depart from that holding. We note, however, that it would be entirely permissible for this court to adopt the pragmatic approach to interpreting the 60-day notice provision by which we would merely require that sixty days elapse prior to district court action on the complaint.[3] The purpose behind the notice provision, as the legislative history makes clear, was to afford the Environmental Protection Agency an opportunity to remedy the alleged vio-

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that found in section 505(b), 33 U.S.C. § 1365(b). *E.g.*, Toxic Substances Control Act, §§ 20, 21, 15 U.S.C. §§ 2619, 2620 (1976); Surface Mining Control and Reclamation Act of 1977, § 520, 30 U.S.C. § 1270 (1976 & Supp. I); Marine Protection, Research and Sanctuaries Act of 1972, § 105, 33 U.S.C. § 1415 (1976); Deepwater Port Act of 1974, § 16, 33 U.S.C. § 1515 (1976); Safe Drinking Water Act, § 2(a), 42 U.S.C. § 300j-8 (1976 & Supp. I); Noise Control Act of 1972, § 12, 42 U.S.C. § 4911 (1976); Resource Conservation and Recovery Act of 1976, § 2, 42 U.S.C. § 6972 (1976 & Supp. I); Clean Air Amendments of 1970, § 12(a), 42 U.S.C. § 7604 (1976 & Supp. I).

[3] *See* H.R. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. 145–46 (1972), reprinted in *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 328–29 (1973) (hereinafter *Legislative History)* (Senate version, adopted in relevant part by Conference Committee, would require that "no action on a suit may begin for 60 days following notification"). Thus, it appears that the Senate bill envisioned filing of a Complaint prior to the passage of 60 days and intended only to defer action on such a suit.

lation prior to judicial action.[4] Thus, in the instant case, we could adopt the position that the failure of the Administrator to take remedial action during the sixty days after receiving notice of the suit permitted the suit to go forward in district court. We need not pass upon this proposition, however, because of our analysis of the independent significance of section 505(e), 33 U.S.C. § 1365(e), the savings clause of the citizens' suit provision.

The district court erred in holding that failure to comply with section 505(b), 33 U.S.C. § 1365(b), created an absolute bar to plaintiffs' suit to enforce the provisions of the Act. The citizens' suit provision of the FWPCAA was modeled on a similar provision in the Clean Air Act. *Compare* Clean Air Act § 304, 42 U.S.C. § 7604 (1976) *with* Federal Water Pollution Control Act § 505, 33 U.S.C. § 1365 (1976 & Supp. I). The slight difference in wording of the citizens' suit provision of each act reflects only the attempt by Congress to ensure that the FWPCAA would comply with the holding of the Supreme Court in the then-recent case of *Sierra Club v. Morton*, 405 U.S. 727 (1972).[5] The Senate version of the bill would have per-

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[4] S. Rep. No. 92-414, 92d Cong., 1st Sess. 79-80 (1972), *reprinted in Legislative History* at 1497-98; *see* W. Rodgers, Environmental Law § 1.13 (1976) (discussing prototype citizens' suit provision of Clean Air Act).

[5] In *Sierra Club*, the Supreme Court analyzed the requirement of standing in the context of litigation by environmental groups pursuant to section 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1976). The Court held that such an environmental group would have standing if it could allege an adverse effect on its interests, whether economic, aesthetic, conservational or recreational. 405 U.S. at 738. The legislative history of the FWPCAA is replete with references to the *Sierra Club* decision and the issue of whether the general language of the Clean Air Act's citizens' suit provision would withstand judicial scrutiny. *See* notes 8-9 *infra* and accompanying text.

mitted any person to sue to enforce the terms of the Act.[6] The House bill would have limited citizens' suits narrowly to suits brought by two types of plaintiffs, citizens of the geographic area who were directly affected by the alleged violation, or groups of persons who, because actively engaged in the administrative process, had shown an interest in the area or the controversy.[7] The Conference Committee chose a middle path, limiting the section 505(a) remedy to citizens, but defining citizen broadly in section 505(g).[8] The intent of Congress was thus to provide generally for

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[6]The Senate bill provided that "any person" could commence a civil action to enforce the terms of the Act "without regard to the amount in controversy or the citizenship of the parties." S. 2770, 92d Cong., 1st Sess. § 505(a) (1971), *reprinted in Legislative History* at 1703–04. The accompanying committee report likewise employed broad phrasing. *See* S. Rep. No. 92–414, 92d Cong., 1st Sess. 79 (1971), *reprinted in Legislative History* at 1497 ("anyone may initiate a civil suit against" specified parties for specific violations).

[7]The House bill provided

> Sec. 505.(a) . . . any citizen may commence a civil action on his own behalf . . .
>
> . . .
>
> (g) For the purposes of this section the term 'citizen' means (1) a citizen (A) of the geographic area and (B) having a direct interest which is or may be affected, and (2) any group of persons which has been actively engaged in the administrative process and has thereby shown a special interest in the geographic area in controversy.

H.R. 11896, 92d Cong., 2d Sess. §§ 505(a), 505(g) (1972), *reprinted in Legislative History* at 1073, 1077.

[8]The final form of the bill reflects the Conference Committee's changes. *See* 33 U.S.C. § 1365(g). The Conference Report notes that the change complies with the *Sierra Club* requirements. S. Conf. Rep. No. 92–1236, 92d Cong., 2d Sess. 145–46 (1972), *reprinted in Legislative History* at 328–29. Senator Muskie's somewhat fuller description of the Conference agreement noted that:

> The Conference agreed to define a citizen, for purposes of the citizen suit section of the water bill, as a "person or persons having an interest which is or may be adversely affected."

1 *Legislative History* at 179 (prepared statement of Sen. Muskie) (Oct. 4, 1972).

citizens' suits which would not be subject to the jurisdictional amount requirement and yet would provide for private attorney general enforcement to the maximum degree permitted by the Court's *Sierra Club* decision.[9]

It is clear, however, from the legislative history that the section 505(a) remedy is not exclusive. That section was intended to give federal courts jurisdiction over suits by private attorneys general seeking to enforce the provisions of the Act. Thus, the notice provision of section 505(b) only applies when a non-injured member of the public sues to enforce the Act. For the purposes of such a suit, Congress created the section 505(a) remedy, permitting suit not subject to the normally required minimum jurisdictional amount. *See* W. Rodgers, Environmental Law § 1.13 (1977) (discussing prototype citizens' suit provision of Clean Air Act). The section 505(a) remedy, however, is not the exclusive vehicle for enforcement of the FWPCAA by private citzens. A private party who is injured by the alleged violation, as these plaintiffs allege they were, has an alternate basis for suit under section

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[9]The legislative history reveals numerous examples of this intent of Congress. *E.g.*, S. Conf. Rep. No. 92-1236, 92d Cong., 2d Sess. 145-46 (1972), *reprinted in Legislative History* at 328-29; 118 Cong. Rec. 33752, *reprinted in Legislative History* at 179 (prepared statement of Sen. Muskie) (Oct. 4, 1972); 118 Cong. Rec. 33756, *reprinted in Legislative History* at 249-50 (remarks of Rep. Dingell) (Oct. 4, 1972). Moreover, although the passage of the House version preceded the *Sierra Club* decision, some representatives argued that the private attorney general theory intended to be adopted called for wording of the section identical to that found in the Clean Air Act. H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 407-09, *reprinted in Legislative History* at 876-78 (additional views of Rep. Bella S. Abzug and Rep. Charles B. Rangel) (describing House version as unnecessarily limited); 118 Cong. Rec. 10771-72, *reprinted in Legislative History* at 671-73 (remarks of Rep. McCloskey) (Mar. 29, 1972) (offering amendment similar to that ultimately adopted at Conference); *see* H.R. Rep. No. 92-911, 92d Cong., 2d Sess. 133-34, *reprinted in Legislative History* at 820-21 (endorsing private attorneys general concept).

505(e), 33 U.S.C. § 1365(e), and the general federal question jurisdiction of the Judicial Code. 28 U.S.C. § 1331 (1976). Section 505(e) is a savings clause that preserves all rights to enforce the Act or seek relief against the Administrator.[10] Coupled with the general federal question jurisdiction it permits this suit to be brought by these parties.[11] Moreover, unlike the private attorneys general provision of section 505(a), section 505(e) provides an independent remedy for injured parties unburdened by the notice requirements of section 505(b).

All parties and the court below acknowledge that the federal courts differ on the issue of whether section 505(e) authorizes private enforcement of the Act alternate to that authorized in section 505(a). The more persuasively reasoned cases, however, support our conclusion that section 505(e) was intended to preserve the rights of injured parties to sue to enforce the terms of the Act notwithstanding the expansion of remedies to non-injured parties contained in section 505(a). They recognize that the effect of section 505(a) is to give the district court jurisdiction over a new class of plaintiffs, while section 505(e) preserves jurisdiction over the preexisting right of injured parties to sue to enforce the Act.[12] By relying on the Clean Air Act, Con-

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[10] Section 505(e) provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

33 U.S.C. § 1365(e).

[11] Under the section 505(e) and 28 U.S.C. § 1331 analysis, the plaintiffs, of course, remain subject to the jurisdictional amount requirement except with respect to their claim for injunctive relief against federal officers.

[12] Natural Resources Defense Council, Inc. v. Train, 510 F.2d 692, 699–700 (D.C. Cir. 1974); *see* Natural Resources Defense Council v.

gress made clear its intention to involve citizens in the enforcement of the Act.

The Second Circuit, in an opinion written by Judge Adams of this court sitting by designation, relied upon the Act's legislative history to support its conclusion that failure to give notice was not an absolute bar to suit under the FWPCAA.[13] Moreover, prior to the district court's opinion in the instant matter, Chief Judge Clarkson Fisher had adopted the section 505(e) jurisdiction analysis as well. In *Township of Long Beach v. City of New York*, 445 F. Supp. 1203 (D.N.J. 1978), Chief Judge Fisher held that plaintiffs who had failed to comply with the section 505(b)

Callaway, 524 F.2d 79, 83–84 (2d Cir. 1975) (60-day notice provision is not absolute bar to suit); Conservation Soc'y of S. Vt., Inc. v. Sec'y. of Transp., 508 F.2d 927, 938 & n.61, 938–39 (2d Cir. 1974) (same; provision intended to create additional remedy), *vacated*, 423 U.S. 809 (1975) (vacated and remanded for consideration of effect of statutory amendments on issue of preparation of environmental impact statement); Township of Long Beach v. City of New York, 445 F.Supp. 1203, 1208–10 (D.N.J. 1978) (finding jurisdiction under 28 U.S.C. § 1331 gives effect to savings clause).

We therefore decline to follow the Seventh Circuit's opinion in *City of Highland Park v. Train*, 519 F.2d 681, 690–91 (7th Cir. 1975), on which the district court relied. The *Highland Park* court's strict reading of the 60-day notice requirement of the Clean Air Act's citizens' suit provision does not persuade us with respect to our savings clause analysis. *See id.* at 693 (rejecting Clean Air Act citizens' suit provision's savings clause analysis); *cf.* West Penn Power Co. v. Train, 522 F.2d 302, 307 & n.20 (3d Cir. 1975) (district court's literal reading of Clean Air Act's 60-day notice requirement not raised on appeal). We recognize instead the intent of Congress to create a remedy for a new class of plaintiffs while preserving in section 505(e) those preexisting rights of injured individuals to enforce the Act.

[13] Conservation Soc'y of S. Vt. v. Sec'y. of Transp., 508 F.2d 927, 938 & n.62, 938–39 (2d Cir. 1974) (§ 1365(b) absolute bar analysis is "crabbed construction . . . which . . . fails to account for § 1365(e)"), *vacated*, 423 U.S. 809 (1975) (vacated for consideration of statutory issue of preparation of environmental impact statement). The court assumed arguendo that it had section 505(e) jurisdiction but denied relief on the merits. *Id.*

notice requirement could sue in district court under section 505(e) and the general federal question jurisdiction, because they were injured parties suing on their own behalf and alleged damage in excess of the normal jurisdictional amount. *Id.* at 1209-10.[14] We must therefore reverse the holding of the district court that it lacked jurisdiction to entertain plaintiffs' claims under the FWPCAA.

We turn now to the issue of whether plaintiffs have a cause of action independent of that created in section 505(a) on which they may bring suit under section 505(e).

In *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court established a four part test for finding an implied private cause of action.[15] Since *Cort*, the Supreme Court has further refined the test to be applied in determining whether a private right of action arises under any given federal

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[14] Nor does our affirmance of the *Loveladies* decision bar today's holding. *See* Loveladies Property Owners Ass'n v. Raab, 430 F. Supp. 276, 280-81 (D.N.J. 1975), *aff'd mem.*, 457 F.2d 1162 (3d Cir. 1976) (failure to give notice bars suit under § 505(a)), *cert. denied*, 432 U.S. 906 (1977). As Chief Judge Fisher noted in *Township of Long Beach*, the section 505(e) argument was not raised in *Loveladies*, and it is questionable whether the plaintiff there had suffered damage in excess of the required $10,000 amount. *See* Township of Long Beach v. City of New York, 445 F. Supp. at 1209 n.8.

[15] 422 U.S. at 78. The factors referred to in *Cort* are:

> First, is the plaintiff 'one of the class for whose *especial* benefit the statute was enacted,' . . . that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? . . . Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? . . . And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Id. (emphasis in original).

statute.[16] In *Cannon v. University of Chicago*, 441 U.S. 677 (1979), the Court broadened the *Cort* test and held that Congress' failure expressly to consider private remedies did not preclude a holding that Congress intended to imply one. *Id.* at 694. More recently, in *Touche Ross & Co. v. Redington*, ___ U.S. ___, No. 78-309 (U.S. June 18, 1979), the Court noted that the *Cort* factors are merely relevant to the inquiry of whether a private remedy is implicit. *Id.* at ___, slip op. at 15. There the Court stated that in *Cort v. Ash*,

> the Court did not decide that each of these factors is entitled to equal weight. *The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action.*

Id. (emphasis added). Thus, the Court noted, the *Cort* factors are simply designed to guide the courts in determining legislative intent. Finally, this Term in *Transamerica Mortgage Advisors, Inc. v. Lewis*, ___ U.S. ___, No. 77-1645 (U.S. Nov. 13, 1979), the Court applied the *Touche Ross* test, noting that the issue of "Whether a statute creates a cause of action, either expressly or by implication, is basically a matter of statutory construction." *Id.* at ___, slip op. at 4. It held that once legislative intent is discovered, countervailing considerations arising from strict application of the *Cort* factors become irrelevant. *Id.* at ___, slip op. at 11-12. Bearing in mind that the single relevant inquiry is the intent of Congress, we turn to the *Cort v. Ash* factors to guide our analysis of the legislative intent.

Applying these factors to the instant case, we hold that a private cause of action is available to these plaintiffs

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[16] Transamerica Mortgage Advisors, Inc. v. Lewis, ___ U.S. ___, No. 77-1645 (U.S. Nov. 13, 1979); Touche Ross & Co. v. Redington, ___ U.S. ___, No. 78-309 (U.S. June 18, 1979); Cannon v. University of Chicago, 441 U.S. 677 (1979).

under the FWPCAA.[17] First, we have already held that one of the purposes behind the passage of the FWPCAA was the protection of individuals from injury caused by the polluting activities of others. Thus, although the Act specifically grants a remedy to non-injured persons suing on behalf of the public, it is clear that the "class for whose *especial* benefit the statute was enacted" must have been individuals likely to suffer actual injury by the pollution.[18] Jurisdiction over suits by them is preserved by the savings clause. Although section 505(a) of the Act permits suits by private attorneys general who have suffered no direct economic harm, the statute clearly was intended to protect this particular class of actually injured persons as well. Plaintiffs are members of a class that takes its living from the sea and that is especially hurt by pollution. The general purpose clause of the Act includes a statement that the national goal shall be the attainment of that "water quality which provides for the protection and propagation of the fish, shellfish, and wildlife." 33 U.S.C. § 1251(a)(2). Although such protection will of course benefit the public at large, the general purpose clause supports our conclusion that the statute was intended to benefit the class of which plaintiffs are a part, and that a private remedy was intended to be created in their behalf.

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[17] We have already held that the district court had jurisdiction to entertain plaintiffs' suit pursuant to section 505(e) of the Act, 33 U.S.C. § 1365(e), and the general federal question jurisdiction, 28 U.S.C. § 1331. Separate analysis of jurisdiction and the merits of the cause of action is required by cases such as *Bell v. Hood*, 327 U.S. 678 (1946), and *Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics*, 403 U.S. 388 (1971).

[18] In *Cannon*, the Court looked to the language of the statute to identify the class intended to be benefitted by the legislation, contrasting such a statute with those intended to benefit the public at large. Cannon v. Univ. of Chicago, 441 U.S. 677, 690 (1979).

As to the second factor in the *Cort* analysis, nothing in the legislative history suggests that the section 505(a) remedy created on behalf of private attorneys general was intended to be exclusive. Indeed, the savings clause broadly preserves all rights to sue "under any statute," language which given the legislative history of the section supports the existence of alternate remedies under the Act.[19] We reject the argument that the legislative history precludes finding an implied private right of action under the FWPCAA. The Report that accompanied the Senate's original version of the bill noted that the savings clause preserved rights to sue "under any other law." S. Rep. No. 92-414 at 81, *Legislative History* at 1499.[20] We are not persuaded that this paraphrase of the wording of the Act was intended to preclude the finding of a private remedy under the Act. The wording of the savings clause itself makes clear Congress' intent to preserve the rights of individuals to sue under *any* statute or the common law.

The third *Cort* factor was expanded by the Supreme Court last Term in *Cannon*. There the Court noted that

> when [a private right of action] remedy is necessary or at least helpful to the accomplishment of the pur-

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[19] We are not persuaded that exclusivity of the section 505(a) remedy is supported by the Senate's rejection of a class action mechanism. S. Rep. No. 92-414 at 81, *Legislative History* at 1499 (§ 505 does not authorize class actions; intended to avoid Fed. R. Civ. P. 23 problems); *see* City of Evansville v. Ky. Liquid Recycling, 604 F.2d 1008, 1014 (7th Cir. 1979) (§ 505 does not authorize class action or suit for damages).

[20] The Seventh Circuit, addressing the issue of whether there was an implied private cause of action for damages under the FWPCAA, was persuaded that the Senate Report evidenced Congress' intent that no remedy other than that provided for in section 505(a) be implied from the FWPCAA. City of Evansville v. Ky. Liq. Recycling, Inc., 604 F.2d 1008, 1018-19 (7th Cir. 1979). We are not persuaded that the language of the Senate Report establishes that the savings clause precludes finding an implied private cause of action under the Act on behalf of these plaintiffs.

> pose, the court is decidedly receptive to its implication under the statute.

441 U.S. at 703. Although not necessary to the accomplishment of the purposes of the FWPCAA, implying a private remedy on behalf of these plaintiffs certainly would be "helpful" to the effectuation of those purposes. Moreover, under the *Cort* analysis, a private remedy would be consistent with the purposes of the Act in general and with the purpose of protecting and encouraging propagation of marine life in particular. *See* 33 U.S.C. § 1251(a)(2) (general purpose clause).

Finally, the fourth inquiry in the *Cort* analysis also points to Congress' intent to permit this private cause of action. Far from being an area of traditional state concern, water pollution of the Atlantic Ocean is an interstate phenomenon of federal concern as to which an implied private remedy in the federal courts should not be denied.[21]

Thus, using the *Cort* factors as a guide, we have examined the statute and its legislative history in order to discover the legislative intent. *See Transamerica Mortgage Advisors, Inc. v. Lewis*, ___U.S. ___, No. 77-1645, slip op. at 4 (Nov. 13, 1979). We therefore hold that Congress intended to permit the federal courts to entertain a private cause of action implied from the terms of the FWPCAA, preserved by the savings clause of the Act, on behalf of individuals or groups of individuals who have been or will be injured by pollution in violation of its terms.

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[21] In *Illinois v. Milwaukee*, 406 U.S. 91 (1972), a unanimous Supreme Court recognized that there is a federal common law cause of action to abate pollution of interstate ambient water, notwithstanding the relief available under the FWPCAA. *Id.* at 103-05. In Part IV, *infra*, we address this reliance on the federal common law of nuisance in the water pollution context.

Having so held, we reject the federal government defendants' sovereign immunity argument. The 1976 amendments to section 1331 of title 28 make clear that sovereign immunity has been waived in all suits by plaintiffs seeking injunctive relief against federal agencies or officers.[22] Whether damages can be recovered from the federal government is a separate question to which the Federal Tort Claims Act speaks. *See* Part VII, *infra*. We must therefore reverse the district court's dismissal of the FWPCAA claims.

II. *The Marine Protection, Research & Sanctuaries Act*

The Marine Protection, Research & Sanctuaries Act, 33 U.S.C. § 1401-1444 (1976) (MPRSA or Ocean Dumping Act) regulates the transporting and dumping of certain material into the open waters of the ocean. *Id.* § 1401. The Act defines the prohibited material to include dredged material, solid waste, sewage and sewage sludge,[23] and provides for an absolute cessation of dumping of sewage sludge by December 31, 1981.[24] Plaintiffs alleged four

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[22] *See* Act of October 21, 1976, Pub. L. No. 94-574, *currently codified at* 5 U.S.C. §§ 702, 703 (1976) and 28 U.S.C. §§ 1331, 1391 (1976).

[23] 33 U.S.C. § 1402(b). The Act also defines "ocean waters" as "those waters of the open seas lying seaward of the base line from which the territorial sea is measured." *Id.* § 1402(c). The Act does not apply to outfall structures regulated by the FWPCAA or the Refuse Act. *Id.* § 1402(f).

[24] *Id.* § 1412a(a) (1976 & Supp. I). The Act defines sewage sludge to include

> any solid, semisolid, or liquid waste generated by a municipal waste water treatment plant the ocean dumping of which may unreasonably degrade or endanger human health, welfare, amenities, or the marine environment, ecological systems, or economic potentialities.

separate violations of the MPRSA,[25] all of which were dismissed on the ground that plaintiffs' failure to give notice barred suit in district court.

Like the FWPCAA, the MPRSA provides that citizens' suits may be brought after giving 60 days' notice[26] and contains a savings clause preserving all other rights to seek relief.[27] Although the wording of the citizens' suit provision of the MPRSA differs slightly from the FWPCAA provision, the jurisdictional analysis is the same.[28] Thus; because these plaintiffs have not complied with the notice requirement of the citizens' suit privision, their suit under section 1415(g)(1), which governs private

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Id. § 1412a(b).

[25] Count I of the Complaint alleged that federal defendants Environmental Protection Agency (EPA) and Army Corps of Engineers (ACE) failed to enforce the provisions of the Act, that the Secretary of the Army and the ACE negligently conducted dredging and dumping operations, and that the state defendants transported and dumped sewage in violation of the Act. Count III alleged that EPA and the Administrator of EPA and ACE and the Secretary of the Army failed to carry out their duties under the Act.

[26] The citizens' suit section of the MPRSA, 33 U.S.C. § 1415(g), provides in relevant part that, subject to the notice requirement, *id.* § 1415(g)(2), "any person may commence a civil suit on his own behalf to enjoin any person" acting in violation of the terms of the Act. *Id.* Other limitations upon the instituting of citizens' suits are directed toward the avoidance of duplicative litigation and are not relevant to this suit. *See id.* § 1415(g)(2).

[27] *Id.* § 1415(g)(5). The savings clause provides

> (5) The injunctive relief provided by this subsection shall not restrict any rights which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief . . .

Id.

[28] *Compare* 33 U.S.C. § 1365(a) (any citizen may sue) *with id.* § 1415(g)(2) (any person may sue). The legislative history of the MPRSA is less clear than that of the FWPCAA, although the citizens' suit provision appears to have been patterned on the Clear Air Act formulation, as was the provision found in the FWPCAA.

attorney general suits by non-injured persons, is barred. However, because they allege that they have suffered direct injury by virtue of the defendants' violations of the Act, jurisdiction over their suit to enforce the provisions of the MPRSA is preserved by the savings clause. Moreover, a private cause of action to enforce the terms of the Act may be implied with respect to these injured plaintiffs. For the purposes of this analysis, the statutory provisions and legislative histories of the MPRSA and FWPCAA are virtually indistinguishable.[29] Thus we hold that the district court had jurisdiction to entertain this suit by these plaintiffs pursuant to the savings clause of the MPRSA and that a private cause of action to enforce the terms of the Act may be implied on behalf of these injured parties. We must therefore reverse the judgment of the district court dismissing the plaintiffs' MPRSA claims.

III. *The Rivers and Harbors Act (Refuse Act)*

Plaintiffs also allege that federal defendant Army Corps of Engineers (ACE) and the state defendants violated section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (1976) (The Refuse Act). The Refuse Act makes it unlawful to discharge or permit to be discharged "any refuse matter of any kind or description whatever other than that flowing from streets and sewers into any navigable water of the United States or any tributary thereof." *Id.*

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[29] Indeed, the MPRSA language, if anything, is broader than that of the FWPCAA. *See* Part I *supra* (legislative history and statutory analysis of FWPCAA). Other courts, including the district court which ruled on this case do not analyze the MPRSA and FWPCAA separately, holding that the Acts are virtually identical in this regard. *E.g.*, Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1210–11 (D.N.J. 1978); Save Our Sound Fisheries Ass'n v. Callaway (SOSF II), 429 F. Supp. 1136, 1140–42 (D.R.I. 1977).

The district court dismissed this part of the complaint. We affirm.

The Rivers and Harbors Act is limited by its terms to enforcement by the United States Attorneys. 33 U.S.C. § 413 (1976). The majority of courts, and the courts of this circuit that have addressed this issue, have held that the Act precludes private suits and have thus refused to find an implied private cause of action. *Red Star Towing & Transp. Co. v. Dept. of Transp.*, 423 F.2d 104, 105 (3d Cir. 1970) (Act enforced by penal sanctions only); *Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1211-12 (D.N.J. 1978) (rejecting private cause of action); *see Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81, 85-87 (2d Cir. 1972) (§ 413 delegates enforcement to Department of Justice; private party may not force prosecution under § 407); *Parsell v. Shell Oil Co.*, 421 F. Supp. 1275, 1279-80 (D. Conn. 1976) (Act protects public at large rather than private group of individuals), *aff'd mem. sub nom. East End Yacht Club, Inc. v. Shell Oil Co.*, 573 F.2d 1289 (2d Cir. 1977); *Anderson v. Norfolk & Western Ry.*, 349 F. Supp. 121, 122 (W.D. Va. 1972) (§ 413 delegates enforcement to United States Attorneys; Act precludes *qui tam* enforcement). We adhere to the view that enforcement of the Refuse Act is limited to actions by the United States Attorneys.[30] Therefore the dismissal of plaintiffs' Refuse Act claims must be affirmed.

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[30] We reject the argument that the court should imply a private cause of action in cases in which the United States Attorney is not in a position to enforce the terms of the Act. *See* NRDC v. Grant, 355 F. Supp. 280, 290 (E.D.N.C. 1973) (finding private cause of action because U.S. Attorney serving as counsel for defendants). The *NRDC v. Grant* decision, finding an implied private cause of action because the United States Attorney was involved as counsel for the federal government defendants, does not persuade us that a private remedy should be implied. That decision was based upon an analogy to two provisions of the Rivers and Harbors Act which have generally been

IV. *The Federal Common Law of Nuisance*

In *Illinois v. City of Milwaukee*, 406 U.S. 91 (1972), a unanimous Supreme Court recognized that there is a federal common law cause of action to abate pollution of interstate ambient water, notwithstanding any relief available under the FWPCAA [31] and held that such a cause of

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interpreted to permit a private cause of action. *Id.* The argument that the conflicting enforcement and defense roles of the United States Attorney support the implied private remedy has been explicitly rejected by this court. Red Star Towing & Transp. Co. v. Dept. of Transp., 423 F.2d 104, 105 (3d Cir. 1970); *see* Township of Long Beach v. City of New York, 445 F. Supp. 1203, 1211–12 (D.N.J. 1978) (no private remedy even if federal government is defendant; rejecting *Grant* analysis); Loveladies Property Owners Ass'n v. Raab, 430 F. Supp. 276, 281 (D.N.J. 1975 (no implied private remedy under §407; relying on *Red Star Towing), aff'd mem.* 547 F.2d 1162 (3d Cir. 1976), *cert. denied*, 432 U.S. 906 (1977).

[31] 406 U.S. at 103–05. The court held that the relief available under the FWPCAA is not an exclusive remedy. *Id.* at 104. In the private enforcement context, this holding probably is statutorily compelled. The FWPCAA provides for injunctive relief and the assessment of civil penalties, but does not create a cause of action for damages. The savings clause of the citizens' suit provision, which preserves all rights of litigants to sue under any statute or common law, has the effect of preserving these plaintiffs' rights to sue for damages under the remedy created in *Illinois v. City of Milwaukee*. *See* 33 U.S.C. § 1365(e).

Since *Illinois v. City of Milwaukee* was decided, the FWPCAA has been amended twice, but these amendments do not suggest that Congress intended to preempt the federal nuisance remedy. The Seventh Circuit, in deciding an appeal from the remand of the *Illinois* case, analyzed the amended act to permit a claim for nuisance independent of the FWPCAA remedies. *Illinois v. City of Milwaukee*, 599 F.2d 151, 162 (7th Cir. 1979) (Act "suggests, if it does not require, the conclusion that Congress did not intend to preempt the federal common law of nuisance"), *petition for cert. filed*, 48 U.S.L.W. 3155 (U.S. Sep. 11, 1979) (No. 79–408); *see* 33 U.S.C. § 1370 (state authority to enforce more stringent limitations); *id.* § 1370 (state authority to enforce more stringent limitations); *id.* § 1371 (chapter shall not be construed to limit or impair authority of officers or agencies). Moreover, the Seventh Circuit relied upon the explicit language of the savings clause in reaching that conclusion. That clause preserves all remedies under "any statute or common law." 33 U.S.C. § 1365(e); *see* S. Rep. No. 93–414 at 81 *reprinted in Legislative History* at 1499 ("Compliance

action presented a federal question over which the district courts had section 1331 jurisdiction.[32] The district court refused to extend the cause of action to private litigants and dismissed plaintiffs' common law nuisance claim. In so holding, the court relied on holdings by other federal district courts that only governmental agencies can sue for relief from a public nuisance.[33] We hold that the common law nuisance remedy recognized in *Illinois v. City of Milwaukee* is available in suits by private parties.

The Court stated explicitly in *Illinois* that although both parties to that suit were governmental, "it is not only the character of the parties that requires us to apply federal law." *Illinois v. City of Milwaukee*, 406 U.S. at 105 n.6. Rather, the Court noted that "where there is an overriding federal interest in the need for a uniform rule of decision . . . . we have fashioned federal common law." *Id.* In the instant case, plaintiffs are suing for damages to interstate ambient water, an issue as to which there is a clear and overriding federal interest in uniformity.[34] There is no question but that the interstate pollution here alleged is a problem calling for the application of a uniform federal standard. Relegating these litigants to possibly

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with [the] . . . Act would not be a defense to a common law nuisance action for damages."). There is no suggestion that "common law" was intended to be limited to state rather than federal common law. We thus agree that the amended Act does not preclude an independent nuisance remedy.

[32] 406 U.S. at 105; 28 U.S.C. § 1331 (1976); *see* Illinois v. City of Milwaukee, 599 F.2d 151, 162-63 (7th Cir. 1979), *petition for cert. filed*, 48 U.S.L.W. 3155 (U.S. Sep. 11, 1979) (No. 79-408).

[33] *See* Parsell v. Shell Oil Co., 421 F. Supp. 1275, 1281 (D. Conn. 1976), *aff'd mem. sub nom.*, East End Yacht Club Inc. v. Shell Oil Co., 573 F.2d 1289 (2d Cir. 1977); Committee for Consid. of Jones Falls Sew. Sys. v. Train, 375 F. Supp. 1148 (D. Md. 1974), *aff'd on different but not inconsistent grounds*, 539 F.2d 1006 (4th Cir. 1976).

[34] In reaching the conclusion that federal common law may be fashioned to deal with federal rights, and that ambient air or water are interstate problems as to which there is a federal common law remedy,

conflicting New York and New Jersey nuisance standards would ignore the clear intent of the Supreme Court to federalize those standards and would undermine that federal uniformity. These plaintiffs have sufficiently alleged pollution of interstate waters.[35] In order to give full effect to the federal common law of nuisance recognized in *Illinois*, private parties should be permitted, and indeed encouraged, to participate in the abatement of such nuisances. Courts have already extended the *Illinois* remedy to the federal government[36] and to municipalities,[37] and one district court has applied it on behalf of private litigants.[38] The effectuation of the purposes of the *Illinois v.*

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the Supreme Court relied upon *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 457 (1975) and *Texas v. Pankey*, 441 F.2d 236, 240–41 (10th Cir. 1971). Illinois v. City of Milwaukee, 406 U.S. at 103 & n.5.

[35] Failure sufficiently to allege interstate effects has proved fatal to plaintiffs seeking to base their suits on the federal common law nuisance remedy. Reserve Mining Co. v. EPA, 514 F.2d 492, 520 (8th Cir. 1975); Committee for Consid. of Jones Falls Sew. Sys. v. Train, 539 F.2d 1006, 1009 (4th Cir. 1976). In *Illinois v. City of Milwaukee*, the immediate issue of concern was the need to apply uniform federal law where the polluting activities of one state caused harm to another state. The need for uniformity, however, is no less a concern where individuals are harmed by the polluting activities of states or their subdivisions. To hold that plaintiffs may not avail themselves of this remedy is to leave open the possibility that this pollution will continue unabated and that the damages suffered by these individuals will be unremedied. Such result was surely not intended by the unanimous Court in *Illinois v. City of Milwaukee*.

[36] United States v. Stoeco Homes, Inc., 498 F.2d 597, 611 (3d Cir. 1974), *cert. denied*, 420 U.S. 927 (1975); United States v. Ira S. Bushey & Sons, 346 F. Supp. 145, 149–50 (D. Vt. 1972), *aff'd mem.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974).

[37] City of Evansville v Ky. Liq. Recycling, Inc., 604 F.2d 1008, 1018–19 (7th Cir. 1979).

[38] In *Byram River v. Village of Port Chester*, 394 F. Supp. 618 (S.D.N.Y. 1975), the court extended the *Illinois v. City of Milwaukee* remedy to (1) Byram River, (2) a private corporation, Byram River Pollution Abatement Association, (3) the Town of Greenwich, a municipal corporation, and (4) a private individual owning land on the

City of Milwaukee remedy and the fulfillment of the Supreme Court's intent in creating that remedy lead us to conclude that it is available to these private litigants who have been injured by the effects of the polluting activities of these defendants. While *Illinois v. City of Milwaukee* did not address this specific issue, we are convinced that the Court would apply the mode of analysis of *Lincoln Mills* [39] and would look to the Restatement formulation as an appropriate source for a federal rule. These plaintiffs have alleged sufficient individual damage to permit them to recover damages for this essentially public nuisance. The Restatement (Second) of Torts defines a public nuisance as "an unreasonable interference with a right common to the general public." Restatement (Second) of Torts § 821B (1979). A private party may recover damages for a public nuisance if, while exercising the common right, he has suffered damages different in kind from those suffered

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river's bank. *Id.* at 622 (relying on *Illinois v. City of Milwaukee* and 28 U.S.C. § 1331).

In *Stream Pollution Control Board v. United States Steel Corp.*, 512 F.2d 1036 (7th Cir. 1975), the Seventh Circuit held that common law relief is available to a pollution control board, but denied the motion of a private individual to intervene on the ground that the federal common law nuisance suit was not a suit commenced to enforce compliance with an FWPCAA "standard, limitation or order." *Id.* at 1039–41, 1040 n.9; *see* 33 U.S.C. § 1365(b)(1)(B) (governing intervention). The court did not address the availability of the *Illinois* remedy to a private individual, but held that the remedy extended to the pollution control board because the "complaint raises substantial questions which only a federal court may finally answer." 512 F.2d at 1040. Although the Seventh Circuit has since questioned the analysis of the FWPCAA permit system in *Stream Pollution*, *see United States Steel Corp. v. Train*, [536] F.2d 822, 830 n.3 (7th Cir. 1977), that affects only the issue of whether under the Act, the private individual could intervene. In *Potomac River Association v. Lundeberg Md. Seamanship School*, 402 F. Supp. 344 (D. Md. 1975), the court permitted private plaintiffs to sue for the maritime tort of nuisance without reference to a federal common law nuisance claim. *Id.* at 358–59; *see* Part V, *infra*.

[39] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).

by the public. *Id.* § 821C. The Restatement formulation encompasses the injury alleged in this case.[40] In *Burgess v. M/V TAMANO*, 370 F. Supp. 247 (D. Me. 1973), the court held that

> it would be incongruous to say that a man engaged in commercial fishing or clamming, and dependent thereon for his livelihood, who may have had his business destroyed by the tortious act of another should be denied any right to recover for his pecuniary loss on the ground that his injury is no different in kind from that sustained by the general public.

Id. at 250. Thus, these plaintiffs, who have a right under federal common law to abate the pollution of interstate waters, have also suffered sufficient individual harm to sue for damages arising from that public nuisance. We therefore hold that the federal common law of nuisance may be enforced by private plaintiffs and that these plaintiffs have sufficiently alleged individual harm to permit recovery of damages for the public nuisance. Thus we must reverse the trial court's dismissal of the plaintiffs' federal common law nuisance claim.

V. *Admiralty Jurisdiction and Maritime Torts*

Plaintiffs also listed the federal admiralty law as an alternate basis for their tort claims. *See* U.S. Const. art III, §2; 28 U.S.C. §1333 (1976); 46 U.S.C. §740 (1976). The Supreme Court's traditional test for the existence of admiralty jurisdiction is two-fold: first, the traditional element

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[40] Illustration 11, explicitly included within the different in kind test, is indistinguishable from the facts of this suit. It states:

> 11. A pollutes public waters, killing all of the fish. B, who has been operating a commercial fishery in these waters, suffers pecuniary loss as a result. B can recover for the public nuisance.

Restatement (Second) of Torts § 821C, Illustration 11 (1979).

of a maritime locality must be established; and second, a significant relationship to a traditional maritime activity must be proven. *Executive Jet Aviation, Inc. v. Cleveland*, 409 U.S. 249 (1972). The situs test may be no longer significant. *See P.C. Pfeiffer Co. v. Ford*, ___U.S.___, 48 U.S.L.W. 4018, 4019 (U.S. Nov. 27, 1979); *Sea-Land Serv. v. Director, Office of Workers' Compens.*, 540 F.2d 629, 635–39 (3d Cir. 1976). That need not concern us here for both elements are satisfied by the allegations of the complaint. The situs of the algal bloom was the high seas. The nexus to maritime commerce is plain. *See, e.g., Moore v. Hampton Roads Sanitation Dist. Comm'n*, 557 F.2d 1030, 1034 (4th Cir. 1976) (harvesting oysters and clams, like fishing, is traditional maritime activity meeting nexus test of *Executive Jet*), *cert. denied*, 434 U.S. 1012 (1978); *Union Oil Co. v. Oppen*, 501 F.2d 558, 561 (9th Cir. 1974) (fishing industry is part of maritime activity); *Potomac River Ass'n v. Lundeberg Md. Seamanship School*, 402 F. Supp. 344, 358 (D. Md. 1975) (injury to commercial fishing meets tests of *Executive Jet*). Thus, this suit by plaintiffs for the tort of nuisance committed in the navigable waters and injuring those engaged in maritime commerce falls within the admiralty jurisdiction of the district court.[41]

Having held that the district court had jurisdiction in admiralty over plaintiffs' claims, we turn to whether plaintiffs have sufficiently alleged a cause of action sounding in maritime tort. One district court has recognized that a suit by clammers and fishermen for damages caused by an oil

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[41] We need not consider plaintiffs' assertion that the court had jurisdiction independently under the Extension of Admiralty Act, 46 U.S.C. § 740 (1976). That Act was intended to broaden jurisdiction to cases over which jurisdiction would not have existed under the strict locality test employed prior to *Executive Jet*. The Act extends admiralty jurisdiction to injuries caused by a vessel on navigable waters the effects of which are felt on land.

spill sounded in maritime tort and that recovery could be had for damages suffered by private plaintiffs alleging tortious invasions different from those suffered by the general public. *Burgess v. M/V TAMANO*, 370 F. Supp. 247, 249-50 (D. Me. 1973). The court held that the pollution was an interference with plaintiffs' direct exercise of a public right to fish and dig for clams and thus caused them damages different in kind from those suffered by the general public. *Id.* at 250.

The district court dismissed this claim on the ground that plaintiffs' Complaint was insufficient to allege a cause of action sounding in maritime tort. To the extent that plaintiffs have attempted to allege a maritime tort, it must be found in Count I of their Complaint. That Count seeks recovery based on a theory of federal common law nuisance, rather than alleging specifically a maritime tort.[42] But the facts which support a *Burgess*-type admiralty tort claim are sufficiently alleged, and thus judged by the standards applicable to motions under Fed. R. Civ. P. 12(b)(6) the Complaint is sufficient. Probably the substantive legal standards applicable to the maritime nuisance tort and the federal common law nuisance tort recognized in *Illinois v. City of Milwaukee* are the same, although on this record we need not fully explore that question. Nor need we decide whether the plaintiffs must at some point

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[42] The confusion arises because the nuisance claim also requires a showing that these private individuals have suffered damages different in kind from those suffered by the general public. *See* Part IV, *supra*. In *Burgess*, the court held that the tort of nuisance could be a maritime tort and analyzed the Complaint under an admiralty theory. *See* 370 F. Supp. at 250. The plaintiffs in *Burgess* did not raise, and the court did not address, the federal common law nuisance issue. Thus, the *Burgess* opinion does not persuade us that an allegation of the tort of nuisance as to which recovery is expressly based on the doctrine of federal common law nuisance may not also be liberally read as sounding in maritime tort.

elect between admiralty and non-admiralty remedies. Finally, the district court did not, and thus we do not reach the question of whether the Limitation of Liability Act, 46 U.S.C. §§ 181–195 (1976), would be available to limit liability of the federal and municipal government defendants for damages to the value of the vessels used to barge the sewage and dredge spoils to the various dumping sites. We do hold that it was error to dismiss plaintiffs' maritime tort claims against all defendants at the pleading stage.

VII. *Federal Tort Claims Act*

The district court held that the cause of action against federal agencies based on maritime tort was barred by plaintiffs' failure to comply with the requirements of the Federal Tort Claims Act, 28 U.S.C. §§ 2671–2680 (1976) (FTCA).[43] The terms of the FTCA define the limits of the Court's jurisdiction to hear suits brought pursuant to the Act. *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *Rosario v. American Export Isbrandtsen Lines*, 531 F.2d 1227, 1231 (3d Cir.), *cert. denied*, 429 U.S. 857 (1976). Under the Act, claims must first be presented to the appropriate federal agency and no suit may be filed until six months thereafter. 28 U.S.C. § 2675. Regulations promulgated pursuant to the Act require that each claim so presented contain a demand for a sum certain. 28 C.F.R. § 14.2 (1978). These requirements were intended to create a system of prelitigation administrative consideration in order to settle claims and avoid unnecessary litigation.[44]

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[43] *See* 28 U.S.C. § 2675 (six months must elapse following presentation of claim to federal agency before suit may be filed); 28 C.F.R. § 14.2 (1978) (claim must demand sum certain in damages).

[44] Bialowas v. United States, 443 F.2d 1047, 1049–50 (3d Cir. 1971); *see* Pennsylvania v. Nat'l Ass'n of Flood Insurers, 520 F.2d 11, 19 (3d Cir. 1975) (sum certain requirement); Ryan v. United States, 457 F. Supp. 400, 402 (W.D. Pa. 1978) (same).

Plaintiffs failed to observe the six months' waiting period. The district court held and we agree that it did not have jurisdiction to entertain the plaintiffs' claims under the FTCA.[45] This precludes a money damage recovery against federal agencies based on state law. Since we are remanding the federal common law nuisance claim we leave open the question, not addressed by the parties to this appeal, whether absent a reference in some statute waiving sovereign immunity for federal common law torts, monetary relief against the federal defendants is unavailable.

VIII. *The National Environmental Policy Act (NEPA)*

The plaintiffs allege that the Environmental Protection Agency has violated the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4361 (1976 & Supp. I), by failing to develop, plan, and coordinate federal functions, programs, and resources to the end that the Atlantic Ocean might exist without degradation, and that those who use the marine environment would be protected from risk to health or safety or other undesirable consequences. The district court held that the complaint failed to state a cause of action under NEPA. The issue is one of considerable complexity. The preparation of an environmental impact statement is required for every "major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (1976). The Administrator of the Environmental Protection Agency,

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[45] We express no view as to whether the sum requested by plaintiffs was sufficiently certain, *see* Fallon v. United States, 405 F. Supp. 1320, 1322 (D. Mont. 1976), or whether plaintiffs' claims against federal agencies and officials for negligent enforcement of various federal acts would be barred by the FTCA's exception for discretionary functions. *See* 28 U.S.C. §2680(a) (1976).

however, is statutorily exempt from the environmental impact statement requirement. 33 U.S.C. § 1371(c)(1) (1976). Whether other substantive provisions of NEPA would afford relief is not entirely clear.[46] Further complicating the application of NEPA is the fact that some actions of the Agency are discretionary, 42 U.S.C. § 4331, and are reviewable only pursuant to the Administrative Procedure Act, 5 U.S.C. § 706 (1976). *See Environmental Def. Fund v. Corps of Eng.*, 470 F.2d 289, 298 n. 14, 298–300 (8th Cir. 1972), *cert. denied*, 412 U.S. 931 (1973). Because it does not appear at this stage of the case that a cause of action based upon NEPA would afford to the plaintiffs and the class they seek to represent any relief different from or more extensive than the relief which would be available under the claims we have already discussed, we decline at this time to pass upon the merits of the rather complex issues posed by NEPA. The district court will be free to reconsider the NEPA contentions in the light of the record developed on remand.

IX. *State Tort Claims Acts*

Moreover, to the extent that plaintiffs also failed to comply with the requirements of the New Jersey[47] and

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[46] Courts differ, for example, on the question of whether section 101 of NEPA, setting forth Congress' declaration of purpose, would afford such relief. *Compare* Calvert Cliffs' Coord. Comm. v. AEC, 449 F.2d 1109, 114 (D.C. Cir. 1971) (§ 101 of NEPA is substantive) *with* Shifflin v. Schlesinger, 548 F.2d 96, 100–01 (3d Cir. 1977) (§ 101 lacks independent substantive impact).

[47] New Jersey Tort Claims Act, N.J.S.A. 59:1–1 to 12–2 (1972). The statute provides that public entities may only be sued if a claim is presented within 90 days after the cause of action accrues and no court suit may be instituted prior to six months thereafter. *Id.* 59:8–8. The trial judge has discretion under the statute to expand the filing time from 90 days to one year if no substantial prejudice results. *Id.* 59:8–9.

New York[48] tort claims acts, the dismissal of their claims under those acts must be affirmed. We do so, however, without prejudice to present compliance with the requirements of those statutes and suit thereunder in the future.[49]

X. *Constitutional Claims*

Plaintiffs also alleged violation of their fifth, ninth, and fourteenth amendment rights. They argued that there is a constitutional right to a pollution-free environment and that by virtue of their special relationship to the environment, they can enforce this right. The district court rejected the constitutional argument and we affirm that holding. It is established in this circuit and elsewhere that there is no constitutional right to a pollution-free environment. *See, e.g., Township of Long Beach v. City of New York*, 445 F. Supp. 1203, 1212–13 (D.N.J. 1978) (citing cases rejecting constitutional analysis). We hold that the district court properly rejected the plaintiffs' constitutional claims.

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[48] N.Y. General Municipal Law (McKinney) § 50-e (1977). The statute provides that notice of a claim must be filed within 90 days after the cause of action accrues, *id.*, that suit may not be filed until 30 days have elapsed after the filing of the notice, *id.* § 50-i(1), and that no suit may be brought more than one year and 90 days after the accrual of the cause of action. *Id.* § 50-i(1)(c). A suit within the admiralty jurisdiction, however, is not subject to the requirements of the New York Tort Claims Act, Rogers v. City of New York, 259 N.Y.S.2d 604, 608–09 (N.Y. Sup. Ct. 1965).

[49] Plaintiffs' failure to comply with the requirements of the state tort claims statutes, however, only bars suit under those statutes. It does not preclude suit if an alternative basis for suit against the defendants is pleaded. The state tort claims acts may not preempt federal statutory or common law causes of action.

XI. *Other Contentions*

Defendants Passaic Valley Sewerage Commission (PVSC), Linden Roselle Sewerage Authority, and Middlesex County Sewerage Authority as separate grounds for affirmance plead that suits against them must be dismissed on eleventh amendment grounds. We reject that contention. These defendants are municipal corporations as to whom sovereign immunity under the eleventh amendment does not apply. *See* N.J.S.A. 40:14B-4 (1957); N.J.S.A. 58:14-2 (1957).

XII. *Conclusion*

The judgment dismissing the Complaint will be reversed to the extent that it dismissed plaintiffs' claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, their common law nuisance claims and their maritime tort claims. The district court's dismissal of the Refuse Act claim, the Federal Tort Claims Act and state tort claims act claims, and the constitutional claims will be affirmed. The district court's dismissal of the National Environmental Policy Act claim will be vacated and that claim remanded for consideration of the record developed on remand. The case will be remanded to the district court for further proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

Judgment of the Court of Appeals

(Filed—February 5, 1980)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-1360

NATIONAL SEA CLAMMERS ASSOCIATION AND GOSTA LOVGREN, APPELLANTS,

v.

CITY OF NEW YORK, HONORABLE ABRAHAM BEAME, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, RUSSELL E. TRAIN, individually and as ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, UNITED STATES ARMY CORPS OF ENGINEERS, MARTIN R. HOFFMAN, individually and as SECRETARY OF THE UNITED STATES DEPARTMENT OF THE ARMY, NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, OGDEN R. REID, individually and as COMMISSIONER OF THE NEW YORK DEPARTMENT OF ENVIRONMENTAL CONSERVATION, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, DAVID J. BARDIN, individually and as COMMISSIONER OF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, BERGEN COUNTY SEWER AUTHORITY,

THE JOINT MEETING OF ESSEX AND UNION COUNTIES, PASSAIC VALLEY SEWERAGE COMMISSIONERS, MIDDLESEX COUNTY SEWERAGE AUTHORITY, THE LINDEN ROSELLE SEWERAGE AUTHORITY, MIDDLETOWN SEWERAGE AUTHORITY, WEST LONG BEACH SEWER DISTRICT, COUNTY OF WESTCHESTER, DEPT. OF ENVIRONMENTAL FAC., CITY OF LONG BEACH AND CITY OF GLEN COVE.

(D.C. Civil No. 77-0126)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GIBBONS and HIGGINBOTHAM, *Circuit Judges* and WEINER, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel on October 16, 1979.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed January 9, 1979, be, and the same is hereby affirmed as to that portion of the said judgment dismissing the Refuse Act claim, the Federal Tort claims Act and state tort claims act claims, and the constitutional claims; that part of the judgment dismissing the complaint is reversed to the extent that it dismissed plaintiffs' claims under the Federal Water Pollution Control Act, the Marine Protection, Research and Sanctuaries Act, their

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*Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

common law nuisance claims and their maritime tort claims; that portion of the judgment dismissing the National Environmental Policy Act claim is vacated and that claim is remanded for consideration of the record developed on remand. It is further ordered that the cause is hereby remanded to the district court for further proceedings, consistent with the opinion of this Court.

ATTEST:

THOMAS F. QUINN
Clerk

February 5, 1980

Certified as a true copy and issued in lieu
of a formal mandate on March 21, 1980.

Test: M. (Illegible)
Chief Deputy Clerk,
United States Court of Appeals
for the Third Circuit

APPENDIX C

Opinion of the District Court

(Filed—August 14, 1978)

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 77-126

NATIONAL SEA CLAMMERS ASSOCIATION, etc., *et al.*, PLAINTIFFS,

v.

CITY OF NEW YORK, etc., *et al.*, DEFENDANTS.

MEANOR, District Judge.

This matter comes before the court on motions by 14 defendants to dismiss the complaint for lack of jurisdiction and/or failure to state a claim upon which relief may be granted. Because the parties rely on material outside the pleadings, these motions will be treated as ones for summary judgment.

Plaintiffs are the National Sea Clammers Association (NSCA), an incorporated association with its principal place of business in Absecon, New Jersey, and Gosta Lovgren, a member of NSCA and a New Jersey resident. They have brought this class action on behalf of those who harvest the waters and the sea beds of the Atlantic Ocean for a living against 16 governmental agency and individual defendants. Said defendants are municipal, county or federal governmental bodies, and employees thereof, charged

with responsibility for sewage disposal and dredging operations on or about the New York-New Jersey seacoast. They may be classified as New York, New Jersey or federal. The New York defendants are: City of New York; Abraham Beame, Mayor of the City of New York;[1] West Long Branch Sewer District;[2] County of Westchester;[3] City of Long Beach and City of Glen Cove. The New Jersey defendants are: Bergen County Sewer Authority; The Joint Meeting of Essex and Union Counties; Passaic Valley Sewerage Commissioners; Middlesex County Sewerage Authority; Linden-Roselle Sewerage Authority; and Middletown Sewerage Authority. The federal defendants are the United States Environmental Protection Agency (USEPA); Russell E. Train, individually and as Administrator of USEPA: the United States Army Corps of Engineers (USACE); and Martin R. Hoffman, individually and as Secretary of the United States Department of the Army.

Plaintiffs allege that the defendants, by commission or omission, have caused or permitted the pollution of the Atlantic Ocean by sewage and other wastes and debris, which pollution has directly or indirectly resulted in damage to the marine environment and destruction of ocean life and the clamming industry. The only damage precisely described in terms of location and date is the allegation that defendants' polluting activities resulted in a massive growth of algae covering the Atlantic Ocean from a few to 20 miles offshore over an area from southwest Long Is-

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[1]Since the filing of this complaint, Edward Koch has replaced Mr. Beame as Mayor of New York City.

[2]The West Long Beach Sewer District has never been served with summons and complaint in this action.

[3]The County of Westchester was apparently served with summons and complaint on January 26, 1977, but it has yet to file an answer.

land, New York to due east of Cape May, New Jersey. This algal bloom is alleged to have occurred in the summer of 1976.

Plaintiffs predicate their 11 count complaint[4] on a myriad of federal and state grounds: The Federal Water Pollution Control Act Amendments of 1972 (FWPCAA), 33 U.S.C. § 1251 *et seq.* (Supp. 1977); The Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Act or MPRSA), 33 U.S.C. § 1401 *et seq.* (Supp. 1977); The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.* (1977); Section 13 of the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. § 407 (1970); article VI, clause 2 of the Constitution of the United States and the fifth, ninth and fourteenth amendments; the Civil Rights Act, 42 U.S.C. § 1983 (1974); the Extension of Admiralty and Maritime Jurisdictional Act, 46 U.S.C. § 740 (1975); the Federal Tort Claims Act, 28 U.S.C. § 1346(b) (1976) and 28 U.S.C. § 2671 *et seq.* (1965); The Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* (1977); federal common law nuisance; New York Environmental Conservation Law, N.Y.Environ.Conserv. § 1-0101 *et seq.* (McKinney 1973); New Jersey Conservation and Development Law, N.J.S.A. 13:10-1 *et seq.* (1968); and state common law trespass and nuisance. Plaintiff allege jurisdiction under 28 U.S.C. §§ 1331 (1966), 1333 (1966); 1343 (1976); 1346(b) (1976), 1337 (1976)

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[4]As originally filed, the complaint contained 13 counts against 20 defendants. On April 26, 1977, the complaint was dismissed as to four New York and New Jersey state defendants: The New York Department of Environmental Conservation (NYDEC); Ogden R. Reid, individually and as Commissioner of NYDEC; the New Jersey Department of Environmental Protection (NJDEP); and David J. Bardin, individually and as Commissioner of NJDEP. At that time, counts V and VI, which pertain only to the dismissed defendants, were dismissed.

and 1361 (1976).[5] Plaintiffs seek $250 million in compensatory damages, $250 million in punitive damages, fines, an injunction and other relief.

The instant action was filed on January 14, 1977. With the exception of the federal defendants and West Long Beach Sewer District, service was effected on the defendants between January 25, 1977 and February 1, 1977. While the summons and complaint were served on USACE, Hoffman, USEPA and Train on January 27, 1977, service against the four federal defendants was not perfected pursuant to F.R.Civ.P. 4(d)(4) (Supp. 1977) until December 2, 1977 with the service of the Attorney General of the United States and the U.S. Attorney for the District of New Jersey. West Long Beach Sewer District was never served. A number of the defendants have filed crossclaims against the other defendants alleging that the crossclaimants have complied with applicable federal and state permits and, therefore, any liability on their part is attributable to the conduct of others.

Some of the defendants received, in addition to the complaint, special notice of plaintiffs' claims. Said notice was in the form of a letter[6] from Edward German, on behalf of

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[5] Plaintiffs have also attempted to predicate jurisdiction on two clearly inappropriate bases, to wit, 28 U.S.C. § 1322 (diversity) and the APA, 5 U.S.C. § 701 *et seq.* Because plaintiffs and several defendants are residents of New Jersey, plaintiffs have failed to show the complete diversity required for jurisdiction under 28 U.S.C. § 1332. *Strawbridge* v. *Curtis*, 7 U.S. (3 Cranch) 267 (1806); *Quaker State Dyeing & Finishing Co. v. Cally*, 528 F.2d 470, 473 (3d Cir. 1975). The APA does not provide an independent jurisdictional base for a suit challenging governmental action. *Califano* v. *Sanders*, 430 U.S. 99 (1977).

[6] The letter was essentially a form letter with appropriate modifications for each addressee. The following is the text of the letter sent to the City of New York:

> PLEASE TAKE NOTICE, that I, Edward C. German, on behalf of the National Sea Clammers' Association and the class of claim-

NSCA, claiming damages caused by pollution to marine environment and life of the Atlantic in an amount "in excess of 250 million dollars." The letter stated further that the property damaged, the value thereof and the cost of repair "cannot be specifically itemized and estimated at this time." This letter was served on the City of New York on November 29, 1976, on Train, Hoffman and USACE on January 3, 1977, and on the cities of Glen Cove and Long Beach on March 25, 1977. The record contains conflicting sworn statements as to whether plaintiffs served the Middlesex County Sewerage Authority with letter notice. Plaintiffs claim to have made service on March 25, 1977, but Middlesex denies receipt.

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ants representing clamdiggers, lobstermen, and fishermen, hereby claim damages in excess of the sum of $250 million, against the City of New York, for injuries and damages to, and the destruction of the property specified in the statement below, and unless such claim is adjusted and paid within the time specified by law, I shall commence an action against said City of New York, to enjoin the complained of conduct, to require the City to take corrective action and to recover damages in excess of $250 million and please take further notice

THAT said property has been damaged day by day since approximately on or before September of 1976 in the Atlantic Ocean in an area ranging from approximately the southwest portion of Long Island, New York, to a point approximately due east of Cape May, New Jersey, and extending from a few miles off shore to more than twenty (20) miles out to sea and further

THAT said damage has been inflicted upon claimants' clam beds, lobster beds, and fishing grounds when such clam beds, lobster beds, and fishing grounds were destroyed by and through the sewage systems owned, operated, and controlled by the City of New York, by which sludge and sewage effluent was dumped directly by ship into the ocean and by which sewage effluent was carried into the ocean by outfall pipes maintained by the City of New York and further

THAT a statement in detail of the property damaged and/or destroyed and the value thereof, as well as the specific cost of repair to claimants' damage property cannot be specifically itemized and estimated at this time.

In addition, on or about March 22, 1977 USEPA was served with a formal claim filed pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.* The amount of the claim was stated to be "in excess of $250,000,000."

The rest of the defendants received no notice of the plaintiffs' claims other than the complaint itself.

With the exception of West Long Beach Sewer District and the County of Westchester, all the defendants have joined in the instant motions for summary judgment on the complaint. Because of the number and variety of the movants and the number of issues raised, I shall consider the contentions of the parties essentially on a count-by-count basis.

DISCUSSION

I

Count I charges that the New York and New Jersey defendants have released sewage effluent and dumped dredgings and toxic materials into the Atlantic with the approval and direction of the federal defendants. These polluting activities are claimed to have fed an algal bloom in the Atlantic during the summer of 1976, destroyed marine life, caused the collapse of the fishing industry and created noxious sights and smells. The creation of this harm and nuisance is specifically alleged to raise a federal question. Thus, Count I sounds in federal common law nuisance.

The defendants assert that private parties, such as the plaintiffs, have no standing to raise a claim in federal common law nuisance. The authorities support defendants' position. In *Illinois v. Milwaukee*, 406 U.S. 91 (1972), the Supreme Court held that the states could sue on a theory of federal common law nuisance to abate the pollution of interstate waters. The Court cited *Georgia* v. *Tennessee*

Copper Co., 206 U.S. 230 (1907), which spoke of the necessity of allowing to states an avenue for judicial resolution of interstate disputes because when the states joined the Union, they gave up their right to forcibly abate nuisances created in other states. *Illinois* v. *Milwaukee*, *supra*, at 104. The opinion quoted further language from the same case to the effect that the Court found it reasonable to enforce a sovereign's demand to be protected from pollution from an extra-state source, notwithstanding the Court's hesitancy to hear a suit between private parties predicated on a federal common law theory. *Id.* at 104–05. Lower courts have refused to extend a right of action in federal nuisance to private parties. *Parsell* v. *Shell Oil Co.*, 421 F.Supp. 1275 (D. Conn. 1976); *Committee for the Consideration of the Jones Falls Sewerage System* v. *Train*, 375 F.Supp. 1148 (D. Md. 1974), *aff'd on different but not inconsistent grounds*, 539 F.2d 1006 (4th Cir. 1976). Plaintiffs have cited no cases to the contrary. It appears that plaintiffs have no standing to raise their federal common law nuisance claim, and Count I must be dismissed.

II

Count II charges the New York and New Jersey defendants and USACE with dumping into the Atlantic and the Hudson River refuse other than that flowing from the streets and sewers in a liquid state in violation of section 13 of the Rivers and Harbors Act of 1899 (Refuse Act), 33 U.S.C. § 407. The defendants take the position that there is no private action under the Refuse Act. Plaintiffs argue that the purpose of the Refuse Act would be advanced by a "private attorney general" action and that such actions have been permitted at least against federal defendants.

The enforcement of the Refuse Act is specifically delegated to the United States, 33 U.S.C. § 413, and it has generally been held that there is no implied private right of action thereunder. *See, e.g., Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972); *Loveladies Property Owners Association* v. *Raab (Loveladies)*, 430 F.Supp. 276, 281 (D.N.J. 1975), *aff'd mem.*, 547 F.2d 1162 (3d Cir. 1976); *Township of Long Beach* v. *City of New York (Township of Long Beach)*, 445 F.Supp. 1203, 1211 & cases cited therein (D.N.J. 1978). However, some courts have found a private right of action under the Refuse Act against federal defendants, *Natural Resources Defense Council* v. *Grant*, 355 F.Supp. 280 (E.D. N.C. 1973); *People of State of Illinois ex rel. Scott* v. *Hoffman*, 425 F.Supp. 71 (S.D. Ill. 1977), on the theory that where the violator is federal, the U.S. Attorney is in no position to enforce the act because he is also charged with the responsibility of defending the violator. *Natural Resources Defense Council* v. *Grant, supra*, at 290.

The rule of this circuit appears to be that there is no private right of action under the Refuse Act regardless of the identity of the defendant. I deduce this from the fact that in *Loveladies, supra*, the Third Circuit affirmed the dismissal of a private cause of action under the act brought against federal and other defendants. *Accord, Township of Long Beach, supra*, at 1212; *Bass Angler Sportsman Society* v. *United States Steel Corp.*, 324 F. Supp. 412, 416 (D. Ala.), *aff'd per curiam sub nom., Bass Anglers Sportsman Society* v. *Koppers Co.*, 447 F.2d 1304 (5th Cir. 1971). *Cf., Red Star Towing and Transportation Co.* v. *Department of Transportation of State of New Jersey*, 423 F.2d 104, 106 (3d Cir. 1970). Thus, plaintiffs' claims in Count II must fall.

III

In Counts III, IV, VIII and IX, the various defendants are charged with violations of FWPCAA and/or MPRSA. Count III alleges that the federal defendants have violated MPRSA. Count IV charges USEPA and Train with violations of FWPCAA. Count VIII alleges that the New York and New Jersey defendants have violated FWPCAA, MPRSA, New York Environmental Conservation Law, New Jersey Conservation and Development Law and permits issued by USEPA, USACE or NYDEC. Count IX charges the federal defendants with negligently carrying out their discretionary functions under FWPCAA, MPRSA and NEPA and further alleges that USACE conducted its dredging activities negligently.

Private actions to enforce FWPCAA and MPRSA are authorized by citizens' suit provisions in each act, 33 U.S.C. § 1365(a), (b) and (c)[7] and 33 U.S.C. § 1415(g)[8] re-

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[7] 33 U.S.C. § 1365 provides:

(a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

spectively. The two citizens' suit provisions are substantially the same. Each contains a notice clause providing that no actions may be commenced under the citizens' suit provision except upon giving notice to the alleged violator

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(b) No action may be commenced—

(1) under subsection (a) (1) of this section—

(A) prior to sixty days after the plaintiff has given notice of the alleged violation (i) to the Administrator, (ii) to the State in which the alleged violation occurs, and (iii), to any alleged violator of the standard, limitation, or order, or

(B) if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right.

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice of such action to the Administrator,

except that such action may be brought immediately after such notification in the case of an action under this section respecting a violation of sections 1316 and 1317(a) of this title. Notice under this subsection shall be given in such manner as the Administrator shall prescribe by regulation.

(c) (1) Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located.

(2) In such action under this section, the Administrator, if not a party, may intervene as a matter of right.

* * * * *

[8] 33 U.S.C. § 1415(g) provides:

(g) (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any prohibition, criterion, or permit established or issued by or under this subchapter. The district courts shall have jurisdiction, without regard to the amount in controversy or

of the act in compliance with the terms of the act and regulations thereunder.

All the defendants argue that plaintiffs have failed to give the requisite notice and that therefore this court has no jurisdiction over plaintiffs' FWPCAA and MPRSA claims. Plaintiffs retort that service of the complaint constitutes substantial compliance with the notice provision. Further, they argue that the court has alternative jurisdiction over these citizens' claims under 28 U.S.C. § 1331, and that in a § 1331 citizens' suit the notice provisions of 33 U.S.C. §§ 1365 and 1415 do not apply. Because the questions of the sufficiency of notice and the availability of alternative jurisdiction without the requirement of notice are threshold issues common to Counts III, IV, VIII and IX, I shall treat those counts together. I shall first consider the FWPCAA claims, then the MPRSA claims, and finally any remaining issues in each of the four counts.

Under FWPCAA, citizens' actions may be brought against anyone who fails to comply with an effluent stand-

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the citizenship of the parties, to enforce such prohibition, limitation, criterion, or permit, as the case may be.

(2) No action may be commenced—

(A) prior to sixty days after notice of the violation has been given to the Administrator or to the Secretary, and to any alleged violator of the prohibition, limitation, criterion, or permit; or

(B) if the Attorney General has commenced and is diligently prosecuting a civil action in a court of the United States to require compliance with the prohibition, limitation, criterion, or permit; or

(C) if the Administrator has commenced action to impose a penalty pursuant to subsection (a) of this section, or if the Administrator, or the Secretary, has initiated permit revocation or suspension proceedings under subsection (f) of this section; or

(D) if the United States has commenced and is diligently prosecuting a criminal action in a court.

ard, limitation or order issued under the act, 33 U.S.C. § 1365(a)(1), or against the USEPA Administrator for failure to perform a non-discretionary duty mandated by the act, 33 U.S.C. § 1365(a)(2). No citizens' action may be commenced without prior notice to the alleged act violator in accordance with USEPA regulations, and, except in circumstances not here relevant, notice must be given at least 60 days before the commencement of the action. 33 U.S.C. § 1365(b). Notice to the alleged violator in a § 1365(a)(1) suit must specify the standard, limitation or order allegedly violated. 40 C.F.R. § 135.3 (1977). Notice to the USEPA Administrator in a § 1365(a)(2) suit must specify the statutory provision claimed to have been transgressed. *Id.* Plaintiffs have failed to give notice to any defendant which satisfies FWPCAA requirements. To the extent notice was given at all, it was untimely and failed to specify any standard, limitation, order or statutory section purportedly violated. Since strict compliance with the notice provisions of 33 U.S.C. § 1365 is required, *Loveladies, supra*, this court does not have jurisdiction of any FWPCAA claims under 33 U.S.C. § 1365.

Plaintiffs take the position that 28 U.S.C. § 1331 provides an alternative basis for jurisdiction. They base their argument on the savings clause of FWPCAA, 33 U.S.C. § 1365(e), which provides:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

They urge that the only interpretation of FWPCAA which gives proper effect to the savings clause is one that finds an implied right of action for private parties to enforce FWPCAA unfettered by the notice requirements of

§ 1365(b) which right may be exercised by grounding jurisdiction on the "arising under" jurisdictional statute.

There is a split among the circuits on the issue whether the virtually identical citizens' suit provisions of FWPCAA, MPRSA and the Clean Air Act, as amended, 42 U.S.C. § 1857 *et seq.* (1969), 42 U.S.C. § 1857h-2 (Supp. 1977), are the exclusive jurisdictional base for private actions to enforce said environmental legislation. The D.C. and Second Circuits have held that the FWPCAA provision is not exclusive, and jurisdiction may be predicated alternatively on 28 U.S.C. § 1331 without compliance with the citizens' suit notice requirement. *Natural Resources Defense Council, Inc.* v. *Train (NRDC* v. *Train),* 510 F.2d 692 (D.C. Cir. 1974), *as modified,* (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.* v. *Callaway,* 524 F.2d 79 (2d Cir. 1975). The Seventh Circuit has held squarely to the contrary with regard to the citizens' suit provisions of the Clean Air Act. *City of Highland Park* v. *Train, (Highland Park),* 519 F.2d 681 (7th Cir. 1975). Another court in this district has followed the lead of the D.C. and Second Circuits on this issue in a FWPCAA and MPRSA context. *Township of Long Beach, supra* (Fisher, J.).

In *Highland Park, supra,* Judge Tone, writing for the court, noted that

> [t]he legislative history of section 304 [42 U.S.C. § 1857h-2 (citizens' suit provision)] shows Congress's determination that citizen participation in the enforcement of standards and regulations under the Clean Air Act of 1970 be established. It also shows, however, that Congress intended to provide for citizens' suits in a manner that would be least likely to clog already burdened Federal Courts and most likely to trigger governmental action which would alleviate any need to for [*sic*] judicial relief. It was in response

> to these concerns that the statutory notice provisions were included in section 304. Congress's intention would be frustrated if the statutory mandate of section 304(b) were ignored.

Id. at 690–91. Later, in discussing *NRDC* v. *Train*, *supra*, which is cited without analysis as persuasive precedent in *Natural Resources Defense Council* v. *Callaway*, *supra*, Judge Tone indicated

> [i]n [*NRDC* v. *Train*], 510 F.2d 692, 698–703 (D.C. Cir. 1975), the majority held that under the Federal Water Pollution Control Act, the pertinent provisions of which are substantially the same as those of the Clean Air Act, judicial review could be obtained . . . under 28 U.S.C. § 1331 . . ., and refers to the Clean Air Act and its legislative history as a basis for its holding. The majority's opinion . . . bases its holding on the saving provision of the Federal Water Pollution Control Act, 33 U.S.C. § 1365(e), which is substantially the same as the saving provision in section 304 of the Clean Air Amendments of 1970, 42 U.S.C. § 1857h-2(e), and the statements in the legislative history that other remedies were not impaired by the act. The opinion does not give any reasons for the court's . . . holding that jurisdiction was . . . conferred by 28 U.S.C. § 1331. Judge Robb's dissent argues that the 60-day notice requirement should control.

Id. at 693. The Seventh Circuit ultimately concluded that

> [t]he saving provision, expressing the general intention of Congress not to disturb existing rights to seek relief, does not have the affirmative effect of removing conditions which existing law imposes upon the exercise of those rights.

Id. at 693.

I concur in the Seventh Circuit's analysis of the citizen suit provision. While the saving clause of FWPCAA, 33 U.S.C. § 1465(e), may indeed make § 1331 available as an alternative basis for jurisdiction, it does not, in addition,

provide a basis to imply a citizens' right of action under FWPCAA on terms and conditions different from those specifically delineated by Congress. The manifest purpose of the savings clause seems to be the preservation of existing rights, not the creation of new ones. Thus, satisfaction of the notice requirements is an unavoidable prerequisite to a citizens' suit. Since plaintiffs have failed to give the notice required by FWPCAA and the regulations thereunder, their FWPCAA claims must fail.

Because the MPRSA citizens' suit provisions, including the notice requirements, are identical to those of FWPCAA in all relevant respects, I have no jurisidiction over plaintiffs' MPRSA claims for the aforementioned reasons. Thus, Counts III and IV must be dismissed in their entirety, and Counts VIII and IX are dismissed insofar as they allege FWPCAA and MPRSA claims.

The claims remaining in Count VIII allege that the New York and New Jersey defendants have violated New York Environmental Conservation Law, permits issued by NYDEC and New Jersey Conservation and Development Law. These are state law claims which will be discussed in XI, *infra*.

Left in Count IX are claims that the federal defendants negligently conducted their discretionary functions under NEPA and that USACE conducted its dredging activities negligently. Violations of NEPA may be reviewed by the courts pursuant to the APA, except insofar as the APA exempts certain functions from review. *See Environmental Defense Fund* v. *Corps of Engineers, U.S. Army*, 470 F.2d 289, 298–300 (8th Cir. 1972). However, discretionary functions are reviewable under the APA, 5 U.S.C. § 706, only where the agency or officer exceeds the limits of discretion established by Congress. *SEC* v. *Republic National Life Insurance Co.*, 383 F.Supp. 436, 438 (S.D.N.Y.

1974); *International Waste Controls, Inc.* v. *SEC*, 362 F.Supp. 117 (S.D.N.Y. 1973), *aff'd per curiam*, 485 F.2d 1238 (2d Cir. 1973). Since no such excess has been alleged, I have no jurisdiction over this NEPA claim. As to the claim of negligent dredging, this claim sounds in tort, and for reasons more fully set forth in IX, *infra*, plaintiffs are precluded by the Federal Tort Claims Act from using USACE with regard to the conduct alleged in the complaint. Thus, Count IX must be dismissed.

IV

In Count VII, plaintiffs allege that USEPA and Train have violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, in that

> [d]espite the continued and increasing discharge of pollutants into the Hudson River, New York Harbor and Atlantic Ocean, defendants have failed to develop, plan, and coordinate federal functions, programs, and resources to the end that the marine environment of the Atlantic Ocean might exist without degradation, and that those who use the marine environment might do so without risk to health or safety or other undesirable and unintended consequences.

Complaint ¶ 71.

The defendants correctly argue that USEPA and its Administrator are specifically exempted by FWPCAA from NEPA requirements, except as regards (1) grants for construction of treatment works and (2) the issuance of new source permits. 33 U.S.C. § 1371(c). Plaintiffs have offered no rebuttal on this point. Since neither of the non-exempt functions are alleged in Count VII, this count fails to state a claim upon which relief may be granted.

V

Count X charges that all the defendants, by action or inaction, have caused "unreasonable degradation of the marine environment" in which there is a public right protected by the fifth, ninth and fourteenth amendments.

The defendants argue that these allegations fail to state a claim because there is no constitutionally protected right to a clean, unpolluted environment. Plaintiffs cite no cases in support of their position that such right exists. Indeed, the courts have consistently held to the contrary. *Ely* v. *Velde*, 451 F.2d 1130, 1139 (4th Cir. 1971); *Township of Long Beach, supra*, at 1212 & cases cited therein. Consequently, Count X must be dismissed.

VI

Count XI alleges that the New York and New Jersey defendants and USACE, by their polluting conduct, have taken and destroyed property held in trust for the public benefit in violation of the prohibition of the fifth amendment of the Constitution of the United States against the taking of private property for public use without just compensation. The defendants argue that plaintiffs have no property right in coastal waters and marine life. Plaintiffs take no position on this point.

It is settled law that the states have title to the coastal waters and marine life within their boundaries, including the seabeds and beds of all tidal waters, within three miles of the coast, while title to the waters beyond three miles from the coast is in the United States. *McCready* v. *Virginia*, 94 U.S. 391 (1876); *U.S.* v. *Florida*, 425 U.S. 791 (1976); Submerged Lands Act of 1953, 43 U.S.C. § 1301 *et seq.* (1964), 43 U.S.C. §§ 1311(a) and 1332. Individual citizens have no property interest in the sea waters, sea beds

or marine life. *Burgess* v. *M/VTamano*, 370 F.Supp. 247, 249 (S.D. Me. 1973). Thus, plaintiffs have no interest protected from condemnation without compensation by the fifth amendment, and Count XI must be dismissed.

VII

Plaintiffs' complaint lists 42 U.S.C. § 1983 as one of the statutes upon which this action is grounded. No specific allegations of facts supporting a § 1983 claim have been made, however. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress.

Since § 1983 requires state action, any claim under that provision against the federal defendants must be dismissed. As to the New York and New Jersey defendants, plaintiffs have failed to plead any right protected by the Constitution[9] at stake in this action. *See* V, VI, *supra*. Nor have plaintiffs alleged any statutory right, privilege or immunity deprived by state action. The various environmental statutes at issue here do not create rights to a clean environment. To the extent they vest private parties with any special interests, they create rights of action to

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[9] Plaintiffs have listed the supremacy clause, art. VI, cl. 2, as one of the many legal bases for this action, but have failed to allege how the provision is implicated in the issues presented. In any case, the supremacy clause does not confer on the plaintiffs any independent right relevant to the matters alleged in the complaint.

enforce certain statutory provisions. The plaintiffs have not alleged that the state defendants have interfered with the exercise of such rights or action. Thus, any § 1983 claim of the plaintiffs must fall.

VIII

Plaintiffs have pleaded the Extension of Admiralty and Maritime Jurisdiction Act, 42 U.S.C. § 740, as one of the bases for this action, but again they have failed to make any factual allegations in support of such claim. Section 740 provides in part that

> [t]he admiralty and maritime jurisdicition of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

Hence, only defendants' polluting activities conducted from ships causing damage on land would be actionable under this provision. In addition, the section specifically requires damage "to person or property." Plaintiffs have alleged no personal injury in their complaint. Nor have they cited any authority which suggests that any of the alleged wrongful conduct caused damage on land which is cognizable under 42 U.S.C. § 740 in admiralty. Thus, plaintiffs have failed to state a cause of action under this section.

IX

Plaintiffs have listed admiralty, 28 U.S.C. § 1333(1), as one of the jurisdictional bases for this action. Some courts have indicated that a commercial fisherman's allegation that polluting activities have caused damage to his fishing operation states a claim for tortious interference with a

public right, a public nuisance cause of action cognizable as a maritime tort in admiralty. *Potomac River Association, Inc.* v. *Lundeberg Maryland Seamanship School, Inc. (Potomac River)*, 402 F.Supp. 344, 358 (D. Md. 1975); *Burgess* v. *M/V Tamano (M/V Tamano)*, *supra*, at 250. In brief, the theory is that while a public nuisance is usually actionable only by the state, a private individual may recover for invasions of the public right if he can show damage of a different kind—not merely of a different degree—from that of the public generally. Commercial fishermen have been held to have such a special interest in the pollution of marine waters. *M/V Tamano*, *supra*, at 250. Torts are cognizable in admiralty where the activity of the injured party bears a significant relationship to a traditional maritime activity. *Executive Jet Aviation, Inc.* v. *Cleveland*, 409 U.S. 249 (1973); *Union Oil Co.* v. *Oppen*, 501 F.2d 558 (9th Cir. 1974); *Potomac River*, *supra*, at 358. Since fishing is a traditional maritime activity, tortious damage to fishing by pollution is actionable as a maritime tort. *Potomac River*, *supra*, at 358. Of course, polluting activities which are in conformity with permits or regulations under pertinent environmental statutes are immunized from tort liability. Id. at 359.

Plaintiffs have not pleaded a claim in this maritime tort, nor have they requested that their complaint be construed to allege such a cause of action. Therefore, I decline to read such a claim into their pleadings. However, even if plaintiffs had raised such a claim, except as to one defendant, their cause of action would have run aground on the shoals of the notice provisions of various tort claims acts.

The federal agency and the state agency defendants are arms of their respective sovereigns, and, hence, are subject to suit in tort only in accordance with the conditions of the waiver of sovereign immunity specified in the tort

claims act of each respective sovereign. *See* N.Y. Gen. Mun. Law §§ 50-i, 50-e (McKinney 1977, § 50-i; The New Jersey Tort Claims Act, N.J.S.A. 59:1-1 *et seq.* (Supp. to Title 58, 1977), N.J.S.A. 59:1-3; the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 28 U.S.C. § 2671 *et seq.*, 28 U.S.C. §§ 1346(b) and 2676. The two federal individual defendants and the mayor of the City of New York, to the extent each acted within the scope of his employment, also enjoy the protection of their respective tort claims act. *See* 28 U.S.C. §§ 1346(b) and 2679(a); N.Y. Gen. Mun. Law § 50-i(1) (McKinney). Each of the three tort claims acts requires the submission of notice of plaintiffs' claim as a predicate to suit.

New York requires that notice be given to the defendant within 90 days of the accrual of the cause of action, § 50-e(1)(a), and that thereafter 30 days must elapse before the commencement of suit, § 50-i(1). Here, the alleged damage occurred in the summer of 1976. New York City received notice on November 29, 1976, and the action was filed on January 14, 1977. None of the other New York defendants received notice, if they got it at all, until March 25, 1977. Hence, only New York City received timely notice. Although application may be made to the court for late notice, § 50-e(5), plaintiffs have made no such effort. Further, leave to grant such application is within the discretion of the court, and since plaintiffs have offered no explanation for their tardiness, I would be disinclined to grant plaintiffs' relief. Mayor Beame was not sued in an individual capacity, and no allegations have been made that he exceeded the scope of his authority. Thus, of the New York defendants, only New York City is subject to tort suit.

The New Jersey Tort Claims Act requires a claim to be presented to the defendant entity within 90 days of accrual

of the cause of action. N.J.S.A. 59:8-8. Application for late filing may be made only up to one year after the accrual of the claim. N.J.S.A. 59:8-9. Plaintiffs have failed to give notice to any New Jersey defendant, except possibly Middlesex County Sewerage Authority. Assuming plaintiffs served a notice on Middlesex on the date they claim, said notice was not timely. No timely application for late filing was made. Thus, plaintiffs are forever barred from bringing these tort claims against the New Jersey defendants. *See* N.J.S.A. 59:8-8(a); *Pinckney* v. *City of Jersey City*, 140 N.J. Super. 96 (Law Div. 1976).

The Federal Tort Claims Act requires that would-be plaintiffs file an appropriate claim with the defendant agency and then wait for six months before commencing suit. 28 U.S.C. § 2675(a). The claim must state a sum certain, 40 C.F.R. § 10.2(a) (1977), and one which does not is a nullity. *Bialowa*[*s*] v. *U.S.*, 443 F.2d 1047, 1050 (3d Cir. 1971). Plaintiffs served their letter notice on USACE, Hoffman and Train on January 3, 1977, and a formal tort claim on USEPA on March 22, 1977. Neither form of notice stated a sum certain, and neither was served six months before suit. The fact that service was not effective on the federal defendants until 10 months after the filing of the complaint does not cure plaintiffs' notice defects. *See Gunstream* v. *U.S.*, 307 F.Supp. 366, 369 (C.D. Cal. 1969). Thus, plaintiffs' tort claims are barred by the Federal Tort Claims Act against USEPA, USACE and against the individual federal defendants to the extent they acted within the scope of their employment.

The complaint recites that Hoffman and Train acted outside the scope of their authority.[10] Complaint ¶¶ 55, 59.

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[10] Federal officials do not have absolute immunity for conduct which is in excess of statutory authority or in violation of the Constitution. *Butz v. Economou*, ___ U.S. ___, 46 U.S.L.W. 4952 (June 29, 1978).

The virtually identical language of the pertinent paragraphs provides:

> (d) Defendant [*sic*] [referring to all the federal defendants or Train and USEPA] have repeatedly exceeded their authority as expressly provided in [FWPCAA or MPRSA].
>
> (e) In particular, defendants have taken no action, despite enforcement powers, to object to or to set aside the granting of and approval of permits issued to conduct ocean dumping operations as described in Count I above.

Enforcement of FWPCAA and MPRSA turns on a host of discretionary functions. Since the pleading fails to state that Hoffman and Train exceeded the scope of their statutory discretionary powers, I construe paragraphs 55 and 59 to allege only abuse of discretion on the part of the individual defendants. Thus, the complaint does not present a claim that they acted beyond the scope of their employment, and they are protected by the Federal Tort Claims Act.

X

Plaintiffs' final federal claim is one in mandamus, 28 U.S.C. § 1361. Mandamus is an extraordinary remedy, available only where governmental officials have clearly failed to perform non-discretionary duties. *Loveladies*, *supra*, at 282; *Carter* v. *Seamans*, 411 F.2d 767, 773 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1969). Mandamus is not available where an adequate alternative remedy exists. *Ex Parte Republic of Peru*, 318 U.S. 578, 584 (1943); *Richardson* v. *U.S.*, 465 F.2d 844, 849 (3d Cir. 1972), *rev'd on other grounds*, 418 U.S. 166 (1974). Plaintiffs have alleged that the various defendants have failed to comply with nondiscretionary duties under various federal and state environmental statutes and permits issued

thereunder. As to any pertinent FWPCAA and MPRSA violations, the citizens' suit provisions of those acts provide a means to compel performance of non-discretionary duties. Plaintiffs have failed to show that the citizens' suit notice provisions render those remedies inadequate. Failure to perform non-discretionary NEPA duties not exempted from liability by other statutes may be reviewed pursuant to the APA, 5 U.S.C. § 701 *et seq.* Section 13 of the Refuse Act, 33 U.S.C. § 407, is a criminal provision which imposes only a discretionary duty of enforcement of the U.S. Department of Justice. *See* 33 U.S.C. § 413. None of the other statutes pleaded appear to create any duties obligatory to any of the defendants herein. Therefore, plaintiffs have failed to state a valid claim in mandamus.

XI

The remaining counts are pendant state law claims. Count XII charges all the defendants with creating a nuisance. Count XIII charges the New York and New Jersey defendants and USACE with trespass and damage to property held in public trust. Since plaintiffs' federal claims have all been dismissed, there is no basis for pendant jurisdiction, *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 726 (1966), and these remaining counts must fall. To the extent that Count VIII raises pendant claims for violation of the New York Environmental Conservation Law, the New Jersey Conservation and Development Law and permits issued thereunder, these claims must also be dismissed. Since the disposition on the motions for summary judgment has mooted the crossclaims for indemnity, such crossclaims are dismissed as well.

It should be noted, however, that because plaintiffs have no ownership interest in the marine environment and ocean life, they have no standing to sue in ordinary nui-

sance, tresspass or for damage to property held in public trust. They could, however, raise a claim sounding in tortious interference with a public right. *See* IX, *supra*. In addition, because plaintiffs failed to comply with the notice provisions of the various tort claims acts, they are precluded from suing in tort against any of the defendants except New York City. *See* IX, *supra*.

The movants will prepare individuals orders[11] in conformity with this decision, and submit them, with consent as to form, within 15 days of the date of this opinion.

Dated: August 14, 1978.

[11] Since the claims against West Long Beach Sewer District and the County of Westchester are no different from those against the other New York defendants who received no special notice of plaintiffs' action, said claims are not viable for the reasons set forth in this opinion. Counsel for Glen Cove will kindly prepare an order dismissing the action as to these two defendants.

APPENDIX D

Order of the District Court
UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 77-126

NATIONAL SEA CLAMMERS ASSOCIATION, ETC., ET AL,
Plaintiffs,

v.

CITY OF NEW YORK, ETC., ET AL,
Defendants.

For the reasons set forth in the opinion of the court dated August 14, 1978,

It is on this 9th day of January 1979 ordered as follows:

1. Count I of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs;

2. Count II of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

3. Count III of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

4. Count IV of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

5. Count VII of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

6. Count VIII of the complaint herein is dismissed in its entirety as to all defendants named therein with costs and with prejudice as to all claims asserted therein that arise under federal law, but without prejudice as to all claims therein that arise under the law of any state.

7. Count IX of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

8. Count X of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

9. Count XI of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice and with costs.

10. Count XII of the complaint herein is dismissed without prejudice but with costs.

11. Count XIII of the complaint herein is dismissed in its entirety as to all defendants named therein with prejudice, except as to defendant New York City the dismissal is without prejudice, but with costs as to all defendants.

12. All crossclaims are hereby dismissed as moot, but without costs.

H. CURTIS MEANOR
U.S.D.J.

APPENDIX E

In the Supreme Court of the United States

No. A-908

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL,
Petitioners,

v.

NATIONAL SEA CLAMMERS ASSOCIATION

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 4, 1980.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 24th day of April, 1980.

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